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THE  
Ontario Law Reports

CASES DETERMINED IN THE SUPREME COURT  
OF ONTARIO (APPELLATE AND HIGH  
COURT DIVISIONS).

1928-1929

REPORTED UNDER THE AUTHORITY OF THE  
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1929



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**JUDGES**  
**OF THE**  
**SUPREME COURT OF ONTARIO**

DURING THE PERIOD OF THESE REPORTS.

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APPELLATE DIVISION.

*First Divisional Court.*

THE RIGHT HON. SIR WILLIAM MULOCK, K.C.M.G., P.C., C.J.O.

THE HON. JAMES MAGEE, J.A.

“ “ FRANK EGERTON HODGINS, J.A.

“ “ WILLIAM EDWARD MIDDLETON, J.A.

“ “ WILLIAM NASSAU FERGUSON, J.A.\*

“ “ DAVID INGLIS GRANT, J.A.

*Second Divisional Court.*

THE HON. FRANCIS ROBERT LATCHFORD, C.J.

“ “ WILLIAM RENWICK RIDDELL, J.A.

“ “ CORNELIUS ARTHUR MASTEN, J.A.

“ “ JOHN FOSBERY ORDE, J.A.

“ “ ROBERT GRANT FISHER, J.A.

HIGH COURT DIVISION.

THE HON. RICHARD MARTIN MEREDITH, C.J.C.P., President.

“ “ HUGH THOMAS KELLY, J.

“ “ HUGH EDWARD ROSE, J.

“ “ WILLIAM ALEXANDER LOGIE, J.

“ “ WILLIAM HENRY WRIGHT, J.

“ “ JOHN MILLAR McEVOY, J.

“ “ WILLIAM EDWARD RANEY, J.

“ “ NICOL JEFFREY, J.

\* Mr. Justice Ferguson died on the 9th November, 1928.

## MEMORANDA.

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### JUDICIAL APPOINTMENTS.

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15th November, 1928.

The HONOURABLE WILLIAM EDWARD MIDDLETON, a Justice of Appeal of the Second Divisional Court of the Appellate Division of the Supreme Court of Ontario, to be a Justice of Appeal of the First Divisional Court of the Appellate Division of the Supreme Court of Ontario and *ex officio* a Judge of the High Court Division of the said Supreme Court of Ontario.

The HONOURABLE ROBERT GRANT FISHER, a Judge of the High Court Division of the Supreme Court of Ontario, to be a Justice of Appeal of the Second Divisional Court of the Appellate Division of the Supreme Court of Ontario and *ex officio* a Judge of the High Court Division of the said Supreme Court of Ontario.

NICOL JEFFREY, of the City of Guelph, in the Province of Ontario, Esquire, one of His Majesty's Counsel learned in the law for the Province of Ontario, to be a Judge of the High Court Division of the Supreme Court of Ontario and *ex officio* a Judge of the Appellate Division of the said Supreme Court of Ontario.

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### • CALLED TO THE BAR.

---

18th October, 1928.

Robert James Anderson, John Joseph Bench, George Maurice Bleakney, Thomas Zeigler Boles, David John Arnold Cuddy, Glen Malcolm Dodman, Kevey Koskey, Kenneth Miller Lash, Maxwell Levy, Wesley Marsh Magwood, Harry Louis Mendelson, Elton Ray Meredith, Sidney Hamlin Robinson, Harry I. Rotenberg, George Harold Shannon, George Robert Sheppard, Francis Joseph Sparham, Nathan Strauss, Michael Vincent Sullivan, William Cyril Henry Terry (with honours), Edward Philip Tilley, William Merion Vickers, Hugh Canniff Willson, William Frederick Woodliffe, Alfred H. Stevenson.

## MEMORANDA.

v

*15th November, 1928.*

Frederick Allan Beck, Henry Lennox Cartwright, Lionel Chevrier, Arthur Edwin Cluffe, John Lash Coburn, Norman Clarke Colbert, John Harley Crawford, Andrew David Crow, Irvine Philip Dickler, Charles Lavigne Furlong, Russell Dodsley Humphreys, John Wilson Keeler, Robert Hewett Littlejohn, James Joseph Lyons, James Maloney, Boulton Stuart Marshall, Ian Munro, Marjorie Marion Jessie Reid, James Russell Reycraft, James Cecil Walt, John Harold Wood, Alexander Joseph McNab, Benjamin Grossberg, Charles Edward Woodrow.

*17th January, 1929.*

Howard O. Hessell, Rowland Francis May (with honours, C.R.M. schol. and silver medal), D'Arcy Roosevelt Lee, Louis Rasminsky, Cecil Clarkson Owen (special—Sask.).

*21st February, 1929.*

Cecil Minto Pyle, Harry Rosenstein.

*18th April, 1929.*

Edmond Baird Ryckman jun.

*20th June, 1929.*

Edwin Alcott Tilley, Peter John Bolsby, George Blakely Bagwell, Robert Cochrane Baird, Peter James Burns, John Beverley Givins, Jean Paul Mageau, Samuel James Dempsey, John Stafford Hayes Beck, Frederick Ashton Burgess, Samuel Ciglen, Janet Isabel Gibson, Herbert Egerton Harris, Ernest Parnell Lee, Albert Shifrin (with honours), David Martin Simons, Alexander Campbell Thompson, Norman Aubrey Todd, Harry Albert Willis, David Wilfred Boyd, Britton Bath Osler, James Douglas Watt, Lancelot Nethery, George Murray Bray, Edwin Hilyard Charleson, William Alexander Carlyle Hall, John Josiah Robinette (with honours, Chancellor Van Koughnet scholarship, and gold medal), William Alan Templeton Van Every, George Norman Cook, Lionel Vaughan Martyn German (special—Manitoba).

## **ERRATA.**

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Page 112, 16th line from bottom, *for* "219" *read* "200."

Page 597, 16th line from bottom, *for* "Employees" *read* "Employers."



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SUPREME COURT OF ONTARIO  
(APPELLATE AND HIGH COURT DIVISIONS).

[ORDE, J.A.]

LAW V. CITY OF OTTAWA PUBLIC SCHOOL BOARD.

1928.

July 26.

*Schools—Public School Board—Resolution to Close School—Rescission—Re-introduction in same Year—Standing Rule of Board Requiring Two-thirds Majority—Construction and Effect of—Whether Resolution ultra Vires—Public Schools Act, R.S.O. 1927, ch. 323, secs. 82 (4), 88 (b)—Power to Repeal Rule by Majority Vote—Injunction—Ineffective Remedy.*

In a report of a committee of the defendant board it was recommended (4) that a school be closed and (5) that another committee be requested to negotiate a sale of the school. This report was adopted at a meeting of the board on the 15th May, one trustee dissenting as to clause 4. At a meeting of the board held on the 1st June, a motion to rescind clauses 4 and 5 of the report was carried by a vote of seven to one. At a meeting of the board on the 11th June the report of a committee was presented recommending that the school be closed and that it (the school building) be leased for two years. When a motion for the adoption of these recommendations was made, the chairman ruled that to adopt it only a majority of the members present was required. The motion was then put and declared carried, four trustees voting for it and three against. The board was composed of nine trustees. By one of the rules of the board, adopted in 1916, "any matter, when once decided by the board, shall not be re-introduced during the year, unless by a two-thirds vote of the members present at the meeting when the same is so introduced." This action was brought to restrain the board from carrying out the last resolution and for a declaration that it was *ultra vires*:—

*Held*, having regard to the provisions of secs. 82 (4) and 88 (b) of the Public Schools Act, R.S.O. 1927, ch. 323, that a rule which restricts the power of a majority cannot be upheld under a power to regulate the conduct of a meeting; and the contention that the force of the rule above quoted is equivalent to that of the Act itself and that it ties the hands of the majority of the board for the remainder of the year is not well-founded.

It was agreed by counsel upon the hearing that, of the nine trustees, five were in favour of the decision to close and rent the school and four against it:—

*Held*, that, as the five trustees who supported the impugned resolution had it in their power, by repealing the rule quoted, to carry out the policy decided upon at the meeting of the 11th June, the Court could not declare the resolution *ultra vires*, and it ought not, in the circumstances, to restrain the board from doing what the majority wished to do and could do by virtue of their statutory powers—the Court will interfere by injunction only when the injunction can be made effective.

MOTION by the plaintiff for an interlocutory injunction.

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June 30. The motion came on for hearing before ORDE, J.A., in the Ottawa Weekly Court, and was by consent turned into a motion for judgment and heard as such.

*M. Doctor*, for the plaintiff.

*W. F. Schroeder*, for the defendants.

July 26. ORDE, J.A.:—The plaintiff, as a ratepayer and public school supporter of Ottawa, brings the action for an injunction restraining the defendants from carrying out a resolution passed on the 11th June, 1928, authorising the closing of the Bolton-street public school, and for a declaration that such resolution is *ultra vires*.

In report No. 11 of the management committee of the defendant board, presented at a meeting of the board on the 15th May, 1928, were the following recommendations:—

“4. That the Bolton-street school be closed at the end of the present school term.

“5. That the finance committee be requested to negotiate a sale of the Bolton-street school.”

This report was adopted, one trustee dissenting as to clause 4.

At a later meeting of the board, held on the 1st June, 1928, a motion to “rescind clauses 4 and 5 of report No. 11 of the management committee” was carried by a vote of seven to one.

Report No. 13 of the management committee, dated the 5th June, 1928, which was presented at a meeting of the defendant board on the 11th June, 1928, contained the following recommendations:—

“13. That the Bolton-street school be closed at the end of the present school term.

“14. That the finance committee be authorised to rent the Bolton-street school for a period not exceeding two years.”

It will be observed that this report, which again recommends the closing of the school, recommends a lease of it instead of a sale.

When the motion for the adoption of clauses 13 and 14 of the report was made, one trustee (the one who had dissented at the meeting of the 15th May) asked the chairman for a ruling as to the majority required to adopt it. The chairman ruled that a majority of the members present was required. The motion was then put and was declared carried, four trustees voting for it, and three against.

This is the resolution in question in this action, and the plaintiff's only ground is that under clause No. 26 of the rules and regulations of the defendant board, adopted in 1916, a two-thirds

vote of the members present at the meeting was necessary for its adoption.

That rule is as follows:—

“26. Any matter, when once decided by the board, shall not be re-introduced during the year, unless by a two-thirds vote of the members present at the meeting when the same is so introduced.”

To this contention counsel for the defendants made many answers. Most of these were of a highly technical nature, and could not, I think, be allowed to prevail if they were the sole defence open to the defendants. I do not think it is necessary to deal with them.

If rule 26 is of such binding effect as to render a majority of the board powerless to reconsider any matter once decided during the remainder of the calendar year, then it might be that the resolution in question, in so far as it adopted the recommendation for the closing of the school, was ineffective.

It was argued that rule 26 refers to the re-introduction of the matter and not to the vote upon the motion itself, and that, as the motion was introduced without a vote upon the question of its introduction, it must be assumed that the members present were unanimously in favour of allowing the matter to be again opened for discussion and decision. This is an extremely technical argument and, I think, answers itself, because, under that construction of the rule, it would seem to be necessary to shew by a substantive resolution that a two-thirds majority had voted for the re-introduction of the matter.

It was further argued that the subject-matters of the resolution of the 15th May and of that of the 11th June are not the same, because, while both recommend the closing of the school, one recommends its sale and the other that it be rented. If the issue depended upon this alone it might be a nice question indeed whether the two clauses in each report are to be considered as one, or as dealing with two distinct matters, namely the closing of the school and its subsequent disposition. If the real subject-matter were the disposal of the school, and its closing incidental, then the subject-matters of the two reports might well be deemed different, but I think it is apparent that the main matter in each report is the closing of the school, and that the selling or renting of it is merely consequential.

A much more substantial point was raised by the defendants, namely that rule 26 was itself *ultra vires* of the board and therefore not binding upon its members.

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The power to make rules is embodied in para. (b) of sec. 88 of the Public Schools Act, R.S.O. 1927, ch. 323, which provides.—

“88. It shall be the duty of the boards of all public schools and they shall have power,—

“(b) to fix the time and place of meetings of the board, the mode of calling and conducting them, and of keeping a correct account of the proceedings of such meetings and to transmit to the Minister all returns and reports required by the regulations.”

Subsection 4 of sec. 82 of the Act, which section deals with meetings of urban boards, provides that:—

“4. The presence of a majority of the members constituting a board shall be a quorum at any meeting and a vote of the majority of such quorum shall be necessary to bind the corporation.”

Nowhere in the Act is there any express power given to the board to pass any rules which can have the effect of overriding the power given to a majority of those present at a duly constituted meeting, regularly called and held, to bind the board. It is argued that this power is implied in para. (b) of sec. 88 from the power “to fix . . . the mode of calling and conducting” meetings. But a rule which hampers and restricts the power of a majority cannot be upheld under a power to regulate the conduct of a meeting. There may, perhaps, be some scope for the operation of rule 26, but the contention that its force is equivalent to that of the Act itself and that it ties the hands of the majority of the board for the remainder of the year is not well-founded for the reasons about to be given.

The defendant board is composed of nine trustees, and it may not be amiss to observe that the plaintiff's contention, if sound, would have this extraordinary effect. If, for example, at a meeting held early in January, at which a bare quorum, namely five, were present, a resolution were passed by a majority of three to two, then at a subsequent meeting at which all nine members were present, the subject-matter of the resolution could not be reintroduced or reconsidered unless six voted for it, though five might be in favour of it, so that a minority of four could, as the result of a vote at a poorly attended meeting, tie the hands of the board for a whole year. In my opinion the Act gives no power to the board by regulation to hamper and restrict the powers of future members in this way.

The question here really falls to be decided upon a well known principle when dealing with the acts or intended acts of corporate bodies. It was agreed by counsel upon the argument before me (it is not otherwise in evidence) that, of the nine trustees com-



posing the defendant board, five are in favour of the decision of the 11th June, 1928, to close and rent the school, and that four are against it.

Now it is quite clear that, even assuming that rule 26 is within the powers of the board and that while it stands any resolution introduced or passed without the requisite two-thirds majority is irregular, there is nothing whatever to prevent the majority of the board from repealing the rule itself and then resolving to close the school. Rule 107 provides that the rules "shall not be repealed, altered or amended without one month's previous notice in writing and then only by a majority of the whole board." This rule may possibly be valid as coming within the power "to fix the . . . conduct of meetings," but, applying it to the present situation, it is plain that the five members of the board who support the impugned resolution have it in their power to carry out the policy decided upon at the meeting of the 11th June. That being so, the Court cannot declare that the resolution is *ultra vires*, and it ought not, in the circumstances, to restrain the defendant board from doing what the majority wish to do and can do by virtue of their statutory powers. The Court will interfere by injunction only when the injunction can be made effective. Here the futility of any such remedy is obvious.

The action will be dismissed, but, having regard to the somewhat unusual circumstances surrounding the proceedings of the board and to the existence of the rule in question, I think the dismissal should be without costs.

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[RANEY, J.]

WALKERVILLE BREWING CO. LTD. v. MAYRAND.

*Public Policy—Contravening Laws of Friendly Foreign Country—"Liquor Export Business"—"Rum-running"—Smuggling—Common Public Knowledge—Judicial Notice—Enforcement of Contract Relating to Business—Refusal of Court to Assist.*

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Sept. 5.

An action brought by a brewery company against the owners of a dock on the Ontario side of the Detroit river to restrain the defendants from shipping from their dock beer other than that brewed by the plaintiffs, in violation of a contract between the parties, was dismissed upon the ground that the Court should not entertain it.

It is common public knowledge that for several years there has existed in Ontario an industry, known as the "liquor export business" or "rum-running," consisting in the exportation of intoxicating liquor to the United States by smuggling and in contravention of the laws of that country. The Court is bound to take judicial notice of that which is thus commonly and publicly known. Viewing the evidence before the Court in the light of that knowledge,

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it clearly indicated that the plaintiffs were not only the lessees of a dock and warehouse that were being used by them for "rum-running" purposes, but were the employers or abettors of one of the gangs of smugglers that infested the Detroit river frontier.

The business thus carried on is contrary to public policy, that is, public policy in the administration of the law by the Courts, and the Courts will not lend their assistance to it.

Under this doctrine of judicial public policy, as distinguished from legislative public policy, freedom of contract will be restrained for the good of the community—no subject can lawfully do that which has a tendency to be injurious to the public good.

*Egerton v. Earl Brownlow* (1853), 4 H.L.C. 1, 196, applied.

The duty of friendly nations towards each other, the rules of international law, and the doctrine of public policy, discussed.

MOTION by the plaintiffs for an order continuing an interim injunction restraining the defendants from shipping from their dock, on the Ontario side of the Detroit river, beer, other than that brewed by the plaintiffs, in violation of a contract between the parties.

The motion was heard by RANEY, J., in the Weekly Court, Toronto.

*Waldon Lawr*, for the plaintiffs.

*R. G. Ferguson*, for the defendants.

September 5. RANEY, J.:—The defendant Mayrand was the former owner, and his co-defendants Wells and Tomasi are the present owners, of a wharf or dock at Petite Côté, on the Ontario side of the Detroit river. The plaintiffs are brewing companies, one of them apparently in succession to the other, located at Walkerville, Ontario. For the purpose of this motion they may be treated as one company, and I shall refer to them in what I have to say as "the brewing company."

In February, 1922, the brewing company made an agreement with Mayrand for the use of his dock on the basis of the payment of 5 cents per case for every case of beer shipped over his premises. It was a condition of the agreement that no beer other than the beer of the plaintiff company was to be shipped from Mayrand's dock. The purpose of this provision was expressed by the brewing company, in its letter to Mayrand embodying the terms of the agreement, to be to protect itself against unlawful acts on the part of others.

Then in October, 1922, there was a new and formal agreement between the parties giving the brewing company, *inter alia*, the right to erect a warehouse at the dock. Under this agreement the brewing company was to pay Mayrand \$100 a month rental



for a term of 10 years with a privilege of cancellation on 6 months' notice. This agreement also provided that no other beer than that of the plaintiff company should be shipped from the Mayrand dock.

By a document dated February, 1924, Mayrand made a further agreement with the brewing company. By the terms of this agreement Mayrand was to be permitted to use the side track of the brewing company "for the purpose of transporting car-lots of whisky from the siding for the use of himself and associates in connection with certain arrangements they have made in handling whisky for export," for which privilege Mayrand was to pay to the brewing company \$25 per car if more than one car per week was run over the siding.

Later on, Mayrand conveyed the dock property to Wells and Tomasi, and they, it is alleged, proceeded, in breach of the covenant of Mayrand, to permit large quantities of beer of the Frontenac, Riverside, Rock Springs, and other breweries to be shipped from the dock, and as a specific instance it is alleged that on the 21st August, 1928, 1,000 cartons of beer and 200 half barrels of beer, other than beer of the Walkerville company, were shipped over the Mayrand dock.

On this statement of facts the brewing company two days later issued a writ and procured an interim injunction from the Local Judge restraining the defendants from shipping beer, other than the beer of the plaintiffs, over the premises in question, and now comes to this Court asking that the injunction be continued till the trial. The principal affidavit in support of the application is made by a Detroit man who describes himself as secretary-treasurer of the brewing company.

A preliminary question is: Will the Court entertain the motion?

It is common public knowledge that for several years there has existed in this Province an industry known to those engaged in it as the "liquor export business"—commonly known by those not engaged in it as "rum-running." The business—which has attained vast proportions—consists in the exportation of liquor to the United States of America, not through the legitimate channels, but by smuggling and in contravention of the constitution and laws of that country. The men engaged in this business would be conspirators and criminals under the laws of the United States, if their acts were done within the jurisdiction of the courts of that country, and upon conviction they would be liable to very severe penalties.

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Of course there is nothing in the material before the Court directly establishing the outlaw character of the business to which the agreements which have been put before the Court relate. For anything that appears in the papers, it may have been the intention of the parties that the beer and whisky referred to in the documents were to be sent through the United States Customs, and it was a submission of counsel for the brewing company that the Court must confine itself strictly to the four corners of the material before the Court. I do not agree. I think the Court is not only entitled, but bound, to take judicial notice of the common knowledge to which I have referred, and to read the material filed on this motion in the light of that common knowledge. In the light of that knowledge, the material clearly indicates that the brewing company is not only the lessee of a dock and warehouse that are being used by it for rum-running purposes, but is the employer or abettor of one of the gangs of smugglers that infest the Detroit river frontier.

But it is said that the liquor export or rum-running business is lawful under Canadian law, and that the courts must therefore treat agreements with reference to it precisely as they would treat agreements having reference to the exportation of any other goods by the usual channels and in the usual way. I put it to counsel for the brewing company whether, if an agreement made in Ontario were on its face clearly in furtherance of a conspiracy against the constitution and laws of a foreign friendly nation, he would argue that our courts would enforce it, and he was driven by the logic of his argument to answer that he would—reserving, of course, his contention that the Court was bound to assume that the business of his clients was legitimate until the contrary was definitely established by direct evidence. As I remarked then, the Court could only make that assumption if it were deaf and blind and idiotic.

It is not at all a question of the statute-law of Canada or of Ontario. It is purely a question of public policy—that is to say, public policy in the administration of the law by the courts, which is essentially different from what may be public policy in the view of the Legislature, which, as has been said, may be and often is nothing more than expediency. Public policy in this sense, or policy of the law, has been defined as the general spirit or purpose of the law as deduced from the course of legislation or from the principles of justice, morality, and convenience, and applied by the Courts in matters concerning which the law is not explicit.

Under this doctrine of judicial public policy, as distinguished

from legislative public policy, the authorities indicate that freedom of contract will be restrained for the good of the community, and that that may be done in a proper case where the contract conflicts with the morals of the times, or contravenes some important established interest of the social order. Or, according to the often quoted definition of Lord Truro, "Public policy . . . is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public good." *Egerton v. Earl Brownlow* (1853), 4 H.L.C. 1, at p. 196.

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Nor is it a question of interference by the Courts of Ontario with the liquor export business as carried on in this Province. The question rather is, Will the courts of Ontario lend that business their assistance? If to do so would be a violation of the "principles of justice, morality, and convenience," and therefore, to adopt the language of Lord Truro, would have a tendency to be "injurious to the public good," then they will not do so.

The leading authorities on international law are at pains to point out that the rules of that science are not really laws at all, because they are destitute of the sanctioning force which is the distinguishing quality of law. The real foundation of international law is, it is said, the educated conscience which is common to the peoples of all the civilized nations of mankind. Being what it is, it follows that international law is a developing science—there is always a wide margin of debatable ground, though the area of certainty is constantly increasing. For instance, in the correspondence between Mr. Charles Francis Adams, United States ambassador to Great Britain, with Lord John Russell, during the American civil war, Mr. Adams contended that it was a rule of international law that it is "the duty of nations in amity with each other not to suffer their good faith to be violated by ill-disposed persons within their borders" merely because of the absence of statutory prohibitions of their conduct. Lord John Russell, on the other hand, took the position that, there being no British law covering the case under discussion, which was that of the famous privateer, the *Alabama*, he was powerless to interfere. Afterwards he expressed polite regret at the British failure to prevent the departure of the ship. "But," said Mr. Adams in one of his reports to Mr. Seward, "he evidently considered it a misfortune rather than a fault which should now be repaired by us through the application of our vast resources to the capture of the offenders. He wondered that we had not done so." A subsequent British Government was not, however, able to defend Lord John Russell's rather naive attitude, and by the Treaty of Washington in 1871

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it was in effect conceded that it had been his duty to stop the Alabama. The only question, therefore, for the consideration of the arbitrators in the Alabama case was whether Lord John Russell had used "due diligence" to prevent the departure of the ship. The Geneva arbitrators held that he had not, and Great Britain was ordered to pay fifteen and one-half million dollars for his failure. The point of the matter now is that the Treaty of Washington was substantially a recognition by Great Britain of Mr. Adams' view, as applied to the facts of the Alabama case, of the duty of friendly nations towards each other.

It is true that the rules of the Treaty of Washington for the guidance of the arbitrators applied only to a state of war and to the facts of the particular case and that those rules have only had the adherence of Great Britain and the United States. But Mr. Adams' proposition did not depend for its validity upon its adoption in advance by the Governments of the world, but rather upon its appeal to the educated conscience of mankind, which, as I have already said, is the only sanction of the science inaccurately called international law. It is therefore not perhaps of much consequence whether Mr. Adams' proposition has actually achieved the dignity of a recognised rule of international law—although so far as the people of Canada are concerned it undoubtedly had their hearty approval at the time of the Fenian raids after the American civil war.

Mr. Adams was speaking of the duties of the executives of governments in amity with each other. But the courts, as I have said, are also a department of government—the three branches of government being the legislative, the executive, and the judicial—and it is as much the duty of the courts to refrain from creating international enmity as it is of the legislative and executive branches to promote international amity.

And it may very well be—I express no opinion—that a lesser degree of offensiveness by "ill-disposed persons" within its jurisdiction would justify the refusal of a court of justice to enforce one of their contracts, than might be thought necessary to ground prohibitive action by the legislative or executive branch. At all events courts of justice ought in international matters, as always, to be sensitive for the national honour.

Perhaps the application of the principle of public policy to the present case would be more obvious if the agreements in question here had had to do with the smuggling of opium or silks or diamonds. If such had been the case, there would scarcely be room for two opinions among respectable Canadians as to the



proper attitude towards the conspirators and smugglers,—because there is no prejudice among Canadians against the customs laws of the United States as applied to these commodities. But quite obviously the fact that public opinion both in Canada and the United States is divided upon the question of prohibitory liquor laws cannot be allowed to affect the Court one way or the other. If the people of Canada were unanimous in disapproval of the prohibitory laws of the United States, they would still be bound to respect those laws, for the purposes of the matter now in hand, just as much as though they were unanimous in approval of them. In other words, it is for the people of the United States to determine their own laws, and it is for the law-abiding people of other countries, including Canada, and therefore for the courts of Canada, not to lend aid or comfort to “ill-disposed persons within their borders” in their violation.

The goods that are one of the subjects of the agreements before the Court are, as I have said, contraband under the constitution and laws of the United States. In the absence of a positive law, Canadian courts are powerless to interfere with the traffic to which the agreements relate, but it would certainly be an unfriendly act on the part of a Canadian court to do anything that would assist the conspirators against the laws of the United States and the smugglers of the contraband goods.

And there is also a domestic aspect of the case. It was not to have been expected that the men engaged in the rum-running business would shew more respect for the laws of Canada or Ontario, than for the laws of the United States or the State of Michigan. It was inevitable that a percentage of the goods that were warehoused by these men at the border, for export under the laws of Canada, would be sold from the warehouses for consumption in Ontario, in bad faith with the Government of Canada and in violation of provincial laws. It was inevitable that, when opportunity offered, the whisky and beer smugglers would bring back return cargoes of goods to be smuggled into Canada. Moreover, the light of experience was scarcely necessary to establish the demoralising effect the outlaw traffic would have upon border communities where it has been carried on since the prohibitory laws of the United States became effective in 1920, and upon the officials of the Canadian department of customs and excise, with whom the smugglers would necessarily be brought into intimate and constant contact and who would in a manner become parties to their operations.

It is now common knowledge that in all these particulars the

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experience of the past eight and a half years has shewn that the law of cause and effect has operated in practice as *à priori* it seemed inevitable that it would. I suppose the Court is also entitled to take judicial notice not only of this common knowledge, but of natural phenomena, for instance, that now, as long ago, it is difficult to handle pitch without becoming defiled.

The success of this action would mean the recognition by the court of the rum-running business as a legitimate Canadian industry—which is impossible, however many companies incorporated under Dominion and Ontario law may be engaged in the business, and however many millions of capital may be invested in it.

The motion to continue the injunction is dismissed; and, the parties having since the argument requested that the motion be treated as a motion for judgment in the action, the action is likewise dismissed. The defendants being also associated by the contract in question with the rum-running business, there will be no costs.

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[APPELLATE DIVISION.]

1927.

PURDOM V. NORTHERN LIFE ASSURANCE CO. OF CANADA.

June 16.

1928.

April 3.

*Trusts and Trustees—Conveyance of Lands to Trustees—Declaration of Trust—Provision for Wife—Life Interest in Lands—Election to Take in Lieu of Dower—Executed Trust—Attempt to Revoke in Part—Power of Trustee to Mortgage Lands—Mortgage Taken with Actual Notice of Wife's Prior Interest—Notice to Solicitors of Mortgagee—Construction of Clause of Declaration—Repugnancy—Breach of Trust—Mortgagee Involved in—Implied Liability of Trustee to Repay Moneys Lent—Indemnity.*

P., in February, 1921, conveyed certain lands to a trust company, and by a declaration of trust of even date, accepted by the trust company, declared certain trusts upon which the lands were to be held: P.'s wife was to have a life interest in three of the parcels conveyed and certain other benefits, and at her death the property was to be distributed among P.'s children; this life interest was to be in lieu of dower in all P.'s lands. On the 21st February, 1921, P., by letter, requested the trust company to sign a declaration of trust to the effect that it held one of the parcels of land conveyed to it, in which the wife was given a life interest, in trust for payment to an investment society of \$7,500, "which pays off the loan on stock for that amount held by my wife;" and this the trust company did. By P.'s will, made on the date of the execution of the conveyance and declaration, he appointed the trust company his executor and trustee. The wife took nothing under the will. P. died in July, 1921. In January, 1923, the trust company made a mortgage in favour of an assurance company upon three of the properties in which the widow claimed a life estate, to secure repayment of a large sum of



money which was advanced to the trust company by the assurance company and which the trust company applied in paying off loans made to P. In an action by the widow against the assurance company and the trust company for a declaration as to her rights under the trust-deed and declaration and for other relief:—

*Held*, that the plaintiff, having taken and continued in possession of the properties in which she claimed to have a life interest, had elected to take the benefits given to her by the trust-deed and declaration, and was, therefore, tenant for life of the three properties referred to.

The declaration of trust, on its execution by P., created an executed trust whereby, in lieu of dower in all his lands, she became (although without her knowledge) at once entitled to a life interest in the lands; and this right at once vested and remained vested in her, unless after knowledge thereof she repudiated it, which she did not. It was not competent to P. either to revoke the trust—an executed trust is not revocable—or to diminish the benefits accruing therefrom to her.

*Standing v. Bowring* (1885), 31 Ch. D. 282, followed.

2. The assurance company took the mortgage with actual notice of the plaintiff's rights—the actual knowledge which the company's solicitors who passed the title had was the actual knowledge of the company.

*Rolland v. Hart* (1871), L.R. 6 Ch. 678, followed.

3. By clause 7 of the declaration of trust, P. authorised and empowered the trust company to sell and convey, mortgage or hypothecate, "my estate" whenever they deem it advisable to do so; to sell any part of "my estate" in order to divide "my estate," and to sell certain specified properties:—

*Held*, that this clause did not entitle the trust company to make the mortgage: the letter of the 21st February, 1921, was ineffective to interfere with the plaintiff's rights under the declaration of trust; and, when P. executed that declaration, the property referred to in the letter was free from any charge or encumbrance.

The power to sell and mortgage applied to "my estate," and those words meant P.'s remaining beneficial interest, and not the life estate already given to the plaintiff.

A life estate having vested in the plaintiff, subsequent language inconsistent with the previous grant would be void for repugnancy.

Clause 7, even if it entitled the trust company to sell or mortgage the life interest of the plaintiff, did so only for her benefit as tenant for life, and not in order to raise money to pay debts, none of which were charged on the plaintiff's life estate.

In so imperilling the plaintiff's interest, the trust company was guilty of a breach of trust, to which the assurance company, who had knowledge through its solicitors of the purpose of the loan, became a party, and was not entitled to maintain any lien, prior to the plaintiff's interest, for the money thus lent.

4. Although the trust company did not covenant with the assurance company to pay the mortgage-moneys and interest, there was an implied liability on the part of the trust company to repay the moneys lent to it, and the assurance company was entitled to indemnity from the trust company.

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ACTION by the widow of John Purdom against the above named assurance company and the Fidelity Trusts Company of

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Ontario for a declaration as to her rights under a trust-deed executed by her husband on the 12th February, 1921, and under his will made on the same day, and for other relief.

March 18, 1927. The action was tried before ORDE, J.A., without a jury, at London.

*J. W. G. Winnett and George Morehead*, for the plaintiff.

*J. G. Gillanders and A. D. McDonald*, for the defendant the Northern Life Assurance Company.

*J. M. Bullen*, for the defendant the Fidelity Trusts Company.

June 16, 1927. ORDE, J.A.:—The plaintiff is the widow of the late John Purdom, who died on the 8th July, 1921. The action involves certain trusts in her favour created by a deed executed by Purdom, dated the 4th February, 1921, but executed on the 12th February, 1921, and also, in some respects, the consideration of his will made on the 12th February, 1921. The defendant the Fidelity Trusts Company is the trustee under the trust-deed and is also the executor under the will. The defendant the Northern Life Assurance Company is the mortgagee of certain of the lands covered by the trusts, under a mortgage thereof given by the Fidelity Trusts Company after Purdom's death.

The plaintiff claims that the trustee had no authority to make the mortgage and that it is not binding upon her interest in No. 124 Dundas-street purported to be covered thereby, that she is entitled to collect the rentals of No. 124 Dundas-street, and that the mortgagee be restrained from collecting the same; that certain moneys paid by the trusts company to certain legatees be refunded to the estate so as to protect the plaintiff's rights; and in the alternative that she is entitled to dower in her late husband's lands and for the assignment thereof.

The deed or declaration of trust of the 4th February (after referring to certain conveyances of the same date whereby Purdom conveyed the lands in question to the Fidelity Trusts Company in fee simple) proceeded to declare the trusts upon which the lands were to be held by the trustee. The relevant trusts were, shortly, as follows:—

1. To permit his wife to live in the house No. 429 King-street, London, and the house at Port Stanley (a summer home), with the furniture and contents of both houses and the Franklin automobile, during her life, in lieu of dower.

2. The taxes, insurance, and repairs were to be paid by his wife while she lived in the houses.

3. The rents of No. 124 Dundas-street, occupied by the Purdom Hardware Company, were to be paid in monthly payments to his wife for life for her support and maintenance, the taxes, insurance, and repairs being paid by the tenants. "The life interest given to my wife is to be in lieu of dower in this and all other properties."

There are certain trusts as to other lands in favour of his daughter Lillian and his sons Alexander and John and certain distributions of the reversion or remainder in favour of his four children in those lands in which his wife is given a life interest. There is then the following provision:—

(7) I authorise and empower the Fidelity Trusts Company of Ontario to sell and convey, mortgage or hypothecate, my estate whenever they deem it advisable to do so; to sell and convert into cash any part of my estate, and from time to time to reinvest the same in such securities as they deem prudent, in order to divide my estate, and I authorise them to sell the vacant lots on Burwell-street, the shop lot, and the remaining houses on York-street."

The trust-deed is typewritten, but prior to its execution two interlineations were made, one in clause 4 and one just before the testimonium clause, in each of which the word "executor" is used and not the word "trustee." Whether this was intentional, or was a mistake due to the fact that he was at the same time making his will, is not disclosed. It has no bearing upon the issues in this action. There was also appended to the trust-deed a further declaration signed by Purdom and dated the 27th April, 1921, which is not in question here. Although the trust-deed upon its face became immediately operative, no effect appears to have been given to it so far as the beneficiaries were concerned during the short period that elapsed before Purdom died.

After Purdom's death, the plaintiff continued to occupy the London dwelling house, No. 429 King-street, and the summer home at Port Stanley. She had seen the trust-deed and the will and was aware of their contents. She says she took no legal advice and had no list of the properties or of their value. She says she did not know the gifts to her were to be in lieu of dower, though how she could have read the trust-deed and not seen the express provision that the benefits conferred thereby were to be in lieu of dower in any of her husband's properties it is impossible to understand.

She also received her rents from the Dundas-street store for some time, at first \$200 per month and afterwards \$150 per month.

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She says she knew nothing about the state of her husband's affairs, or that there were any debts or mortgages, and she was unable to say when she first heard that a mortgage to the Northern Life had been given.

It will be simpler to deal first with the question of the plaintiff's claim by way of alternative relief to have her dower assigned. Since her husband's death, in addition to the enjoyment of the benefits conferred upon her by the trust-deed, she has joined in several conveyances by the trusts company of parcels of realty formerly belonging to her husband, for the purpose of releasing her dower therein. If the acceptance of the benefits did not themselves constitute an election against her claim to dower, which in my opinion in the circumstances of the present case would be its effect because the benefits were expressly given in lieu of dower, the actual release of her dower in part of her husband's realty constituted such an acquiescence in the settlement and disposition of his estate made by the trust-deed and by his will as to make it inequitable as to those who benefited by the release of dower to allow her now to elect against the trust-deed.

The point was not raised by the defendants, but in my opinion this action itself constituted an election to take under the trust-deed. Assuming that prior to the commencement of the action the plaintiff had been free to elect for or against the trust-deed, she must surely make her election before she brings her action. I am puzzled to know upon what principle she can set up a right to certain benefits under the trust-deed and at the same time say, "If my interpretation of the trust-deed is not upheld by the Court so that I do not get as much under it as I had expected, then I shall abandon my claim thereunder and fall back on my right to dower." She is not here claiming alternative relief for the same cause of action, but she is setting up two causes of action each of which necessarily excludes the other. And the election to take either under or against the instrument is a very essential part of her cause of action and cannot be deferred until she sees "which way the cat jumps." If in the present case it were quite clear that the plaintiff had not elected, her action would probably be defective and she would be obliged first to make her election and then to frame her action accordingly. Here her pleadings are consistent with the facts establishing an election, and she relies upon the trust-deed, merely claiming her dower as an alternative if her contention as to the extent of her rights under the trust-deed should fail. This in my judgment she cannot do.



The case is therefore narrowed down to the primary question whether or not the mortgage in question has priority over the trusts declared by the trust-deed, either by reason of the power to mortgage thereby purported to be given to the trustee or through the protection given to the mortgagee by the Registry Act. Depending upon the determination of this question are two subsidiary ones, namely: (1) If the mortgage is subject to the plaintiff's life interest, is the mortgagee entitled, under its third party notice, to be indemnified by the trusts company? And (2) if the mortgagee has priority over the plaintiff, is she entitled in this action to some relief against the trusts company, and, if so, what?

The circumstances under which the mortgage was given are a little complicated and require some elucidation. At his death Purdom was indebted to the Dominion Savings and Investment Society in a large sum for several advances made to him from time to time. These advances were secured by mortgages upon different parcels of realty in London, none of them being either of the parcels in which the plaintiff is given a life interest by the trust-deed. One of the parcels so mortgaged was sold during Purdom's lifetime, and the mortgage was discharged, but the loan was not in fact paid off, Purdom promising that he would give the society a mortgage upon the hardware store, that is, 124 Dundas-street. This promise he never carried out. Another of the loans was originally made to the plaintiff herself in 1919, when \$7,500 was advanced and secured by a pledge of 200 shares in the Dominion Savings and Investment Society, which were purchased with the advance and placed in her name. In January, 1921, she transferred these shares to her husband, and the loan was thereafter carried by the society as an indebtedness of his.

In June, 1922, the assets of the Dominion Savings and Investment Society passed into the hands of the Huron and Erie Mortgage Corporation, which then began to press the Purdom estate for payment of the loan.

In consequence of this pressure, the Fidelity Trusts Company, on the 15th January, 1923, applied to the defendant the Northern Life Assurance Company for a loan of \$29,832.76 upon the security of a mortgage upon No. 124 Dundas-street and 429 King-street (the two London properties in which the plaintiff had a life interest under the trust-deed) as well as two other parcels of realty included in the trust-deed. The application was granted, and the mortgage in question, dated the

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15th January, 1923, was executed and was registered the next day. The Northern Life Assurance Company, on the 16th January, 1923, issued its cheque for \$29,832.76 in favour of the Fidelity Trusts Company, which endorsed it to the Huron and Erie Mortgage Corporation in payment of the amount due by John Purdom for principal and interest upon the indebtedness to the Dominion Savings and Investment Society.

When the mortgage was executed and registered and the moneys advanced by the Northern Life, the declaration of trust of the 4th February, 1921, had not been registered. The registered title of the Fidelity Trusts Company was shewn by the conveyance from Purdom to it of the same date, the 4th February, 1921, which had been duly registered on the 18th May, 1921, prior to his death. That was an ordinary conveyance under the Short Forms Act for an expressed consideration of \$1, and no trusts were declared or disclosed thereby. Mrs. Purdom was not a party to this conveyance, so that the trusts company took the lands subject to any right to dower which might accrue to her upon her husband's death if she should so elect. Her election to take under the trust-deed which I have held resulted from her acceptance of its benefits disposes of that question so far as it affects the title of the mortgagee; but the failure to make her a party to the mortgage is not without significance upon the contention that the Northern Life had no actual notice of the existence of any trusts, because it is difficult to believe that, had the Northern Life or its advisers not known of the trust-deed and its consequent effect upon Mrs. Purdom's dower, the title would have been passed without a release from her.

There was a very close relationship between the Fidelity Trusts Company and the Northern Life Assurance Company. The president, the vice-president, and two other directors of the Northern Life were also directors of the trusts company. The president, the late T. H. Purdom, K.C., was also president of the Fidelity Trusts Company, and his firm acted as solicitors for both companies and also acted as solicitors for the late John Purdom, and had prepared the trust-deed and the will.

It was urged that all these facts were sufficient to fasten actual notice of the trust-deed upon the Northern Life, and several cases were cited for and against this contention. I do not think it is necessary for me to deal with this question, because in my opinion clause 7 of the trust-deed above quoted gave the Fidelity Trusts Company ample power to make the mortgage.

By that clause, the trusts company is given power "to sell

and convey, mortgage or hypothecate, my estate whenever they deem it advisable to do so." It was not suggested by counsel that the words "my estate" strictly construed might be limited to whatever estate Purdom might leave at his death over and above the lands settled by the trust-deed. This construction would make the power ineffective, for there would be nothing for it to operate upon. And in his will executed the same day there is a similar power in the same language given to the trusts company in its capacity of executor. Clause 7 must, therefore, be deemed to apply to the lands settled by the trust-deed.

It is urged on behalf of the plaintiff that the words "in order to divide my estate" govern all the early language of the clause and that the power to sell and mortgage is limited to that purpose. But the two earlier parts of the clause are divided by a semi-colon, and I think it is clear that the words "in order to divide my estate" refer to the provision for selling and converting into cash and for reinvestment, and do not apply to the words which precede the semi-colon. Apart from this, any such limitation as that suggested is inconsistent with the repetition of the power to sell. The express power to sell "the vacant lot on Burwell-street, the shop lot, and the remaining houses on York-street," was quite plainly (as an examination of the original trust-deed will shew) added after the instrument was prepared. The clause is not artistically drafted, but, taken in conjunction with the wide power of investment given by clause 8, it gives complete power to the trustee to sell or mortgage the subject-matter of the trusts whenever it may deem it advisable to do so.

The trusts company had therefore, in my opinion, ample power to give the mortgage of the 15th January, 1923, and to grant to the Northern Life Assurance Company all the estate of the late John Purdom in the lands covered thereby, with priority over any of the trusts declared by the trust-deed, and freed from any dower that the plaintiff might have in the mortgaged lands.

The plaintiff alleges that the trusts company has paid large sums of money to several legatees under John Purdom's will without regard to the liabilities of the estate or to the rights of the plaintiff as widow of the deceased, and claims that these moneys be refunded.

The plaintiff is not a beneficiary under her husband's will and cannot attack the trusts company upon any such footing. But I think it is clear that if in the administration of the Pur-

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dom estate the trusts company, in its capacity as executor under the will, saw fit to exercise the power given by the trust-deed to mortgage the lands in which the plaintiff had a life interest in order to raise moneys to pay the liabilities of his estate, then his estate must protect her against the peril in which the mortgage places her. The settlement effected by the trust-deed is necessarily paramount to the gifts made by the will. The trusts company appears to have dealt with the trust-property under the trust-deed and the estate which passed under the will as if they comprised a common or blended mass over which, in either or both of its capacities, it might exercise control without too strict a regard to the real distinction between the two trusts. The trust-deed was not a testamentary instrument. If the claims of creditors cannot be satisfied out of the assets of Purdom's testamentary estate, then the trusts company ought not to have resorted to the trust-estate for the purpose of securing funds to pay creditors. It is possible that the settlement might be subject to attack by creditors as a voluntary one and therefore fraudulent as against them. Had the trustee of the settlement been a different person or corporation from the executor, the present situation could hardly have arisen.

Evidence was given as to certain sums paid out or advanced by the trusts company to different members of the Purdom family, but it also appeared that the estate was indebted to the trusts company in respect of part of the advances so made. Nor was it clear whether or not some of the moneys so advanced were out of the funds of the testamentary estate or were proceeds of realisations under the trust-deed, or both. It was obviously impossible, upon the evidence before me and in an action framed as this one is, to determine clearly what is the plaintiff's remedy as against the trusts company; but, as the persons to whom the advances were made are not before the Court, of course no order can be made requiring them to refund. It may be that in the winding-up of the estate sufficient may be realised to pay off the mortgage and other liabilities without having to compel the legatees to refund the moneys advanced to them.

The plaintiff is 66 years of age; and, while the giving of the mortgage has placed the life interest settled upon her by the trust-deed in jeopardy, there has not in fact been any interruption in the enjoyment of the dwelling houses in London and Port Stanley or in the receipt of the rents from the store property on Dundas-street. Matters were brought to a head by the notice given by the Northern Life, as mortgagee, to the tenant of the



store to pay the rent to it, and the plaintiff thereupon brought this action, but the notice was not acted upon, so that the plaintiff so far has suffered no real injury. If the trusts company during her lifetime can protect her life interest by seeing that there is no default in the payments due from time to time upon the mortgage, she need feel no alarm. This suggestion does not necessarily mean that she has no immediate remedy for the peril in which her life interest has been placed, but I do not see what relief she can obtain in an action framed like this, which was substantially an attack upon the mortgage and the trustee's power to give it.

The plaintiff's right to be protected against the trustee's action in giving the mortgage may perhaps be determined in an action for administration, or in an action in which the trusts company and all the beneficiaries of the estate, and possibly the other beneficiaries under the trust-deed, are all parties, for a declaration as to her right to be protected and for an account of all moneys improperly paid to beneficiaries which ought to have been paid to creditors. It may be that the plaintiff's right to be protected or indemnified may not give her the status of a creditor to enable her to bring an action for administration. She will have to follow whatever course she may be advised in any future action, but the judgment in this action should be without prejudice thereto. Further litigation may perhaps be avoided if the trusts company can in some way give the plaintiff a binding undertaking to protect her life interest under the trust-deed. To do so might necessitate the trusts company's procuring a satisfactory indemnity from the legatees or other beneficiaries, but they might be well advised to give it rather than be subjected to an expensive law-suit with the consequent prolonged proceedings in the Master's office.

There will therefore be judgment:—

1. Dismissing the plaintiff's action as against both the defendants.

2. Declaring that the plaintiff has in the circumstances elected to take the benefits conferred by the trust-deed in lieu of her dower.

3. Declaring that the mortgage to the Northern Life Assurance Company of the 25th January, 1923, is a valid mortgage, having priority over the life interest of the plaintiff, and free from her claim to dower in the lands thereby mortgaged.

4. That the costs of the defendant the Northern Life Assurance Company, including any costs incurred by reason of the

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third party notice given to the defendant the Fidelity Trusts Company, be paid by the plaintiff, and that there be no order as to costs as between the plaintiff and the Fidelity Trusts Company; and

5. Declaring that the dismissal of the action shall be without prejudice to any action or other proceeding which the plaintiff may bring against the Fidelity Trusts Company for the purpose of enforcing whatever right she may have to protect her life interest in the lands mentioned in the trust-deed of the 4th February, 1921, and to be indemnified out of the estate of the late John Purdom in respect of the mortgage in question.

The plaintiff appealed from the judgment of ORDE, J.A.

January 16 and 17. The appeal was heard by MULOCK, C.J.O., HODGINS and FERGUSON, JJ.A., FISHER, J., and GRANT, J.A.

*W. N. Tilley, K.C., and Winnett,* for the appellant.

*Gillanders,* for the defendant the Northern Life Assurance Company, respondent.

*Bullen,* for the defendant the Fidelity Trusts Company, respondent.

April 3. The judgment of the Court was read by MULOCK, C.J.O.:—This is an appeal from the judgment of Orde, J.A., dismissing the action and declaring that the defendant the Northern Life Assurance Company as mortgagee is entitled to priority over the life estate of the plaintiff in certain lands, and free from dower therein of the plaintiff.

Some of the circumstances which have given rise to the issues between the plaintiff and the defendant the Northern Life Assurance Company, hereinafter referred to as the assurance company, and the defendant the Fidelity Trusts Company, hereinafter referred to as the trust company, are as follows:—

John Purdom, the plaintiff's husband, a resident in the city of London, in the Province of Ontario, owned his homestead property situate in that city, also a summer residence in Port Stanley, premises known as 124 Dundas-street in London, and other properties. By deed bearing date the 4th February, 1921, in consideration of \$1, he granted and conveyed to the trust company, amongst other lands, the homestead, the Port Stanley summer residence, and the Dundas-street property. This deed, though absolute in form, was intended to vest the said lands in the trust company as trustee upon and subject to the trusts set forth in a



certain declaration of trust of even date therewith, between the said John Purdom and the trust company, which reads as follows:—

“Know all men by these presents that whereas John Purdom, of the city of London, in the county of Middlesex, contractor, did by indenture bearing date the 4th day of February, 1921, grant and convey the lands and premises hereinafter described to the Fidelity Trusts Company of Ontario, upon certain trusts hereinafter set forth:—

“Now therefore the said John Purdom does hereby declare that he did by the said indenture grant and convey the lands and premises hereinafter described to the said the Fidelity Trusts Company of Ontario, and the Fidelity Trusts Company of Ontario hereby declares that it accepted the said deeds and transfers on the trusts and conditions and with the powers hereinafter set forth, that is to say:—

“1. To permit my wife Margaret Purdom to live in the house in which we now live, 429 King-street, in the city of London, in the county of Middlesex, and garage connected therewith, and my house in the village of Port Stanley, in the county of Elgin, being lots 7, 24, and 25, according to registered plan number 221, and the lake front connected therewith, owned by me; and to have the use of the furniture and contents in these houses, and the Franklin automobile, for and during the term of her natural life; in lieu of dower. Should the said houses, or either of them, be rented and my wife not desire to live therein, the rents are to be paid to my estate; except the Port Stanley property, which she may rent if she so desires, and the rentals are to go for her benefit.

“2. The taxes, insurance, and repairs on the said property are to be paid by my wife, if she lives in the said house, and if not, then to be paid out of my estate.

“3. The property known as number 124 Dundas-street, running through to Carling-street, is now occupied by the Purdom Hardware Company. The rent therefor is to be paid in monthly payments to my said wife Margaret Purdom for and during the term of her natural life for her support and maintenance. The taxes, insurance, and repairs are to be paid by the tenants of the Purdom Hardware Company, or such tenant or tenants as may occupy the same. The life interest given to my wife is to be in lieu of dower in this and all other properties.

“4. The house in which my daughter Lillian lives, 427 King-street, is to be conveyed to her; at the time of my wife's death,

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my daughter Lillian may exchange this house even for No. 429 King-street, which her mother is to have for her life. She is also to have such part of the furniture as she desires, and the executor may dispose of the balance as it thinks best; and the house in which my son Alexander H. Purdom lives, number 351 Burwell-street, is to be conveyed to him; and I desire that my son John Wilson Purdom shall have transferred or conveyed to him the equivalent or value of one of the said houses. When these conveyances are to be made is to be entirely in the discretion of the Fidelity Trusts Company of Ontario, but they are not to be made until after the death of my wife, and my said sons and daughter are to pay, while they occupy the said property, the taxes, insurance, and repairs.

"5. On the death of my wife, the store property, 124 Dundas-street, in the city of London, and the property in the village of Port Stanley, in the county of Elgin, and any real estate not specifically given to each child, and all the balance of property covered by this declaration, is to be equally divided between my four children, one-fourth to each. In making the said division, it is my desire that my son Thomas shall be enabled to become the owner of the Purdom Hardware Company, either by purchase of the other interests, or in whatever way the Fidelity Trusts Company of Ontario deems best. It is also my desire that the Fidelity Trusts Company of Ontario shall make the division, and such division shall be final and binding on all parties interested, and the said the Fidelity Trusts Company of Ontario are to use their discretion when the said transfers should be made.

"6. Should any of my said children die before me, leaving issue, such issue shall take the share the parent, if living, would be entitled to.

"7. I authorise and empower the Fidelity Trusts Company of Ontario to sell and convey, mortgage or hypothecate, my estate whenever they deem it advisable to do so; to sell and convert into cash any part of my estate, and from time to time to reinvest the same in such securities as they deem prudent, in order to divide my estate, and I authorise them to sell the vacant lot on Burwell-street, the shop lot, and the remaining houses on York-street.

"8. The Fidelity Trusts Company of Ontario may invest any sums which come into their hands hereunder, in such manner as to them seems prudent, without being confined to such investments as a trustee or executor may make, according to law. and without being responsible for loss occasioned thereby.

"9. The lands referred to in this declaration are as follows:"

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(Then follows a description of the lands in which the plaintiff claims a life estate, and other lands.)

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"Should my executor deem it wise, it may postpone any of the said conveyances, and whatever the said executor decides to do is to be final, and I desire it to have power also to withhold payments of any kind hereunder.

"In testimony whereof the said John Purdom has hereunto set his hand and seal, and the Fidelity Trusts Company of Ontario has affixed its corporate seal, attested by the signatures of its president and manager, this 4th day of February, 1921.

"Signed, sealed, and delivered in the presence of

"(Sgd.) Jno. Purdom.

"(Sgd.) T. H. Purdom, president.

"(Sgd.) W. J. Harvey, manager.

"I declare that the following shall be added as an additional condition to the above declaration of trust.

"I have transferred policy No. 8, issued by the Northern Life on my life to John Wilson Purdom. He transferred it to the Dominion Savings and Investment Society as collateral security for money advanced to him. No part of such advances were made to me. The policy belongs to me and is payable to my estate. Any sums due to the said society are to be paid by and charged to my said son when and as my said trustee desires.

"Dated April 27th, 1921.

"Witness: (Sgd.) Alex. Purdom. (Sgd.) Jno. Purdom."

The deed and declaration of trust were executed by John Purdom on the 12th February, 1921, and the deed was registered in the proper registry office in that behalf on the 18th May, 1921. A few days after execution of the said declaration of trust, John Purdom, by letter to the trust company bearing date the 21st February, 1921, requested that company to sign a declaration of trust to the effect that it held the said "deed of property No. 124 Dundas-street in trust for payment of \$7,500, which pays off the loan on stock for that amount held by my wife Margaret Purdom, to the Dominion Savings and Investment Society;" and this the trust company did.

On the 12th February, 1921, simultaneously with executing said deed and declaration of trust, John Purdom made his last will and testament whereby he appointed the trust company his executor and trustee. The plaintiff took nothing under the will, nor can it affect her rights under the declaration of trust.



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On the 8th July, 1921, John Purdom died. About a week thereafter the declaration of trust and will were read to the plaintiff, whereupon, as she swore at the trial, "I thought I just had to take what was given me." As she took nothing under the will, she evidently meant that she accepted what was given her by the conveyance and declaration of trust; that is, she elected to take the benefits thereby provided for her in lieu of her dower in the whole of her husband's real estate. These benefits were the right to the occupation or the rents accruing from the property at Port Stanley, the right to occupy personally the homestead in London, the right to use the furniture and other contents of both houses, and his automobile, and the right to all the rent of premises No. 124 Dundas-street during her lifetime. She at once entered into the enjoyment of those provisions and has ever since enjoyed them except as hereinafter mentioned.

By indenture of mortgage bearing date the 15th January, 1923, and registered on the 16th January, 1923, the trust company purported to grant and convey by way of mortgage to the assurance company as security for payment of \$29,832.76, among other properties, the fee simple in the Port Stanley property, the homestead property, and the premises No. 124 Dundas-street, in each of which properties, by reason of the trusts created as above mentioned and of the plaintiff's election, she was entitled to a life estate. Default having been made in payment of the mortgage-moneys, the assurance company, by notice dated the 3rd June, 1926, notified the tenants of premises No. 124 Dundas-street that as such mortgagee it was entitled to the rents thereof, and in consequence of such notice since that date they have not been paid to the plaintiff.

The declaration of trust was not registered until after the registration of the mortgage to the assurance company, and the assurance company's defence is that it became mortgagee in good faith for value without notice of the declaration of trust, and it pleads the Registry Act. The trust company in its defence alleges that it was authorised by the declaration of trust to make the mortgage in question; that the mortgage-moneys were paid to the Huron and Erie Mortgage Corporation for the purpose of paying off loans made by the Dominion Savings and Investment Society to the said John Purdom, as security for which he had pledged with the Dominion Savings and Investment Society the properties in which the plaintiff claims a life estate, and that the plaintiff had barred her dower by electing to take

under the declaration of trust the benefits thereby provided for her. App. Div.

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The assurance company, by third party notice, has brought in the trust company as third party, and in the event of the plaintiff in respect of her life interest being entitled to priority over the assurance company as mortgagee, the assurance company claims from the third party indemnity for any loss thereby sustained.

To this claim the third party answers that four of the directors of the assurance company, namely, T. H. Purdom, Alexander Purdom, Nathaniel Mills, and Llewellyn Purdom, constituted the majority of the executive committee of the assurance company at the time the mortgage transaction in question was entered into; that these four directors passed the loan, and that by reason thereof the assurance company had full knowledge of the position of the third party in the transaction, and therefore is estopped from denying knowledge thereof.

The evidence at the trial disclosed the following facts in addition to those above set forth:—

Prior to and at the time of the death of John Purdom, T. H. Purdom, K.C., and Alexander Purdom, his brothers, and Llewellyn Purdom, were practising as solicitors in partnership in the city of London, in the name of Purdom & Purdom, and were solicitors for John Purdom, the trust company, the assurance company, and the Dominion Savings and Investment Society. When the mortgage transaction in question was entered into, T. H. Purdom, Alexander Purdom, Nathaniel Mills, and Llewellyn Purdom were directors of the trust company and of the assurance company, T. H. Purdom being president and Alexander Purdom vice-president of each company. After a regular meeting of the board of directors of the assurance company held on the 15th January, 1925, a special meeting was held at about 5 p.m., there being present four directors only, namely, the said T. H. Purdom, president, Alexander Purdom, vice-president, Nathaniel Mills, and Llewellyn Purdom. At that meeting a written application of the trust company for the loan of \$29,832.76 was received and approved of. The meeting lasted but a few minutes.

In this mortgage transaction Messrs. Purdom & Purdom acted as solicitors for the assurance company, prepared and caused the mortgage to be registered, which was done about 15 minutes past 10 o'clock on the morning of the 16th January, 1923, and they certified to the assurance company on the



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back of the said application, as to the title, in the following language: "To the Northern Life Assurance Company of Canada, London, Ontario. The title to the mortgaged premises has been examined and found satisfactory for the purposes of the company," and they directed that the mortgage-moneys be paid over to the Huron and Erie Mortgage Corporation, and this was done.

The following are extracts from the evidence of Alexander Purdom, a witness at the trial. To Mr. Winnett:—

"Q. Did you attend the meeting at which this application was presented to the directors of the Northern Life? A. Yes, I was at the meeting when the statement was laid before the committee.

"Q. And the late T. H. Purdom, K.C., was he there, too? A. Yes.

"Q. And at that meeting did you know of that trust document that was executed by John Purdom? A. Yes.

"Q. Did T. H. Purdom know about it? A. Yes.

"His Lordship: You are speaking of the trust-deed of the 4th February, 1921?

"Mr. Winnett: Yes, the declaration of trust which was dated the 4th February, 1921.

"Q. Now, was Llewellyn Purdom aware of this declaration of trust at that date? A. Well, I think so. I would say he did.

"Q. Did any of the other directors know of the declaration of trust? A. I cannot tell about them.

"His Lordship: I would like to know how you knew of the trust-deed. Did you prepare it? A. It was prepared by my brother T. H. Purdom and I witnessed it.

"Q. In addition to that, did you have any knowledge of that as a director of the Fidelity Trusts Company? A. Yes, I had knowledge of it as a director of the Fidelity Trusts Company.

"Q. As well? A. As well.

"Q. Quite apart from your knowledge of it as one of the solicitors who prepared it? A. Yes.

"Q. Was it mentioned at the meeting at which this application for the loan was made? A. I cannot remember it being mentioned at the meeting.

"Q. This application, I understood from the previous witnesses, was accepted at that meeting and the cheque was given at that time? A. At that meeting the loan was passed subject to

the valuation of Mr. Mills and if his valuation was satisfactory it was to go through.

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"Q. You knew the title, I presume, and gave the endorsement that is on the back of the application? A. Yes.

"Q. It is signed Purdom & Purdom? A. I signed it.

"Q. Certifying to the title? A. Yes.

"Q. Did you investigate the title or just know it? Did you investigate the title before you signed the certificate? A. No."

The plaintiff did not execute any formal bar of dower in any of the lands covered by the mortgage and to which the certificate of title has reference.

Cross-examined by Mr. Bullen for the trust company:—

"Q. Prior to John Purdom's death, I believe you and your brother T. H. Purdom acted as solicitors? A. Yes.

"Q. Do you remember the circumstances surrounding the drawing of the trust-deed that has been put in as exhibit No. 3 and the deed that has been put in as exhibit No. 2? A. Yes.

"Q. That is the declaration of trust, the deed and the will were signed on the 12th February, 1921? A. That is right, in Mr. John Purdom's dining room at his residence.

"Q. Who were present? A. T. H. Purdom, John Purdom, and myself."

All the mortgage-moneys were applied in payment of the indebtedness of John Purdom, but at the time of his making the deed and declaration of trust of the 4th February, 1921, none of the lands in which the plaintiff claims a life interest were in any way encumbered in respect of any indebtedness of John Purdom.

The first question to determine is: What is the plaintiff's interest in the three properties in which she claims a life interest?

I think it is the law that, when one person transfers property to another without that other's knowledge, the property at once vests and remains vested in the other until he expressly or impliedly repudiates the transfer, and that the same results follow if the subject-matter of the transfer is, as here, an equitable right.

The declaration of trust, on its execution by John Purdom on the 12th February, 1921, created an executed trust whereby, in lieu of dower in all his lands, the plaintiff became entitled, amongst other benefits, to the life interest claimed in this action.

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This right at once vested and remained vested in her unless after knowledge thereof she repudiated it. In the meantime it was not competent to her husband either to revoke the trust or to diminish the benefits accruing therefrom to her; and his letter of the 21st February, 1921, requesting the trust company to declare that it held premises No. 124 Dundas-street in trust to pay to the Dominion Savings and Investment Society the sum of \$7,500, was inoperative as respects her right in the Dundas-street property. If entitled to diminish the benefits, he would be equally entitled to revoke the entire trust. That an executed trust is revocable is not arguable.

The law in the case of the transfer of property, whether real or personal, without the knowledge of the transferee, is fully discussed in *Standing v. Bowring* (1885), 31 Ch.D. 282, and at p. 288 Cotton, L.J., says:—

“I take the rule of law to be that where there is a transfer of property to a person, even although it carries with it some obligations which may be onerous, it vests in him at once before he knows of the transfer, subject to his right when informed of it to say, if he pleases, ‘I will not take it.’ When informed of it he may repudiate it, but it vests in him until he so repudiates it.”

In the same case, Lindley, L.J., says at p. 290:—

“I take it now to be settled, that although a donee may dissent from and thereby render null a gift to him, yet that a gift to him of property, whether real or personal, by deed, vests the property in him subject to his dissent.”

For these reasons I am of opinion that the plaintiff, after her husband's death, elected, in lieu of dower in the whole of her husband's estate, to accept the benefits provided for her by the declaration of trust, and therefore was tenant for life in the Port Stanley, the homestead, and the Dundas-street properties.

The next question is, was the assurance company a mortgagee without actual notice of the plaintiff's rights by virtue of the said declaration of trust? The evidence of Alexander Purdom above set forth shews that his firm, when acting as solicitors for the assurance company in respect of the mortgage transaction, had actual knowledge of the declaration of trust; that he was the member of the firm who personally attended to the mortgage matter, and that such knowledge was then present to his mind, and that he was perfectly familiar with the title. He actually knew that the plaintiff, immediately after her husband's death, had accepted the benefits given to her by the declaration of trust—such benefits including her personal occupation of the homestead and her receipt

of all the rents of the Dundas-street property. He actually knew that her acceptance of the benefits under the declaration of trust was in lieu of dower in all her husband's property, that therefore in equity she had ceased to have dower in the mortgaged lands, and had become tenant for life of the three properties in question.

The solicitors for the assurance company, when they passed the title, had actual notice of the declaration of trust, and in my opinion their actual notice was actual notice to the assurance company, and the defence that the assurance company became mortgagees without actual notice fails.

In *Rolland v. Hart* (1871), L.R. 6 Ch. 678, at pp. 681 and 682, Lord Hatherley, L.C., says:—

"It has been held over and over again that notice to a solicitor of a transaction, and about a matter as to which it is part of his duty to inform himself, is actual notice to the client. Mankind would not be safe if it were held that, under such circumstances, a man has not notice of that of which his agent has actual notice. The purchaser of an estate has, in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance because he was not told of it by his solicitor.

"It cannot be left to the possibility or the impossibility of the man who seeks to affect you with notice being able to prove that your solicitor did his duty in communicating to you that which, according to the terms of your employment of him, was the very thing which you employed him to ascertain.

"I think it is clear, upon the authorities, that as there was, in this case, plain and distinct notice on the part of the solicitor employed by Mr. Stagg of the previous security, that notice must therefore be imputed to Mr. Stagg" — holding that the actual knowledge of the solicitor was the actual knowledge of the client.

Having reached the conclusion that the actual knowledge of the solicitors of the assurance company was also its actual knowledge, it is unnecessary for me to consider whether actual knowledge of any of its directors can be imputed to the company.

I now turn to the defence of the trust company. It alleges that the plaintiff barred her dower by accepting in lieu thereof the provisions made for her in the declaration of trust, and that by clause 7 of the declaration of trust it was authorised and empowered "to sell and convey, mortgage or hypothecate," the estate of the testator as it deemed "advisable to do so," and that this clause entitled the trust company to make the mortgage in question, and that all the mortgage-moneys were used "to pay to the

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Huron and Erie Mortgage Corporation for the purpose of paying off loans made by the Dominion Savings and Investment Society to John Purdom . . . as security for which the said John Purdom pledged with the Dominion Savings and Investment Society the property so mortgaged."

If this alleged pledging has reference to the letter of John Purdom of the 21st February, 1921, seeking to charge the plaintiff's life interest in the Dundas-street property, I have already expressed my opinion as to the ineffectiveness of that attempt to interfere with the plaintiff's rights under the declaration of trust, and would add that when, on the 12th February, 1921, John Purdom executed the declaration of trust, the Dundas-street property was free from any mortgage, lien, charge, or other encumbrance.

The defence of the trust company that it was authorised by para. 7 of the declaration of trust to make the mortgage in question, must, I think, for the following reasons, fail. First, the power to sell or mortgage applies not to the plaintiff's but to "my estate." Those words must mean Purdom's remaining beneficial interest and not the life estate previously given to the plaintiff. It is in this limited sense that the words "my estate" are used in paras. 1 and 2, which give the plaintiff a life estate in the two houses.

Further, a life estate having, under the provisions of paras. 1, 2, and 3, vested in the plaintiff, subsequent language inconsistent with the previous grant would be void for repugnancy.

Further, I am of opinion that the declaration of trust (para. 7) entitled the trust company to sell or mortgage the life interest of the plaintiff only for her benefit *quâ* tenant for life, and not, as here, in order to raise money wherewith to pay the debts of a third party, none of which were charged on the plaintiff's life estate. In so imperilling her interest, the trust company was guilty of a breach of trust. The solicitors of the assurance company were aware of the purpose of the loan, and their knowledge was also that of the assurance company, which thus became a party to this breach of trust, and is not entitled to maintain any lien on the trust premises, prior to the plaintiff's interest, for the money thus lent.

As to the claim of the assurance company against the trust company, although the latter did not covenant with the assurance company to pay the mortgage-moneys and interest, still, inasmuch as the assurance company lent the mortgage-moneys to the trust company, there is an implied liability on the part of the latter to repay the debt and interest: *Falconbridge on Mortgages* (1919),



p. 367; Halsbury's Laws of England, vol. 21, p. 70, para. 124.

For these reasons I think this appeal should be allowed with costs, and that the assurance company is entitled to indemnity over against the third party with costs, to which should be added the costs payable by the assurance company to the plaintiff, and that judgment should be entered to the effect above indicated.

*Appeal allowed.*

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[MIDDLETON, J.A.]

RE THOMPSON AND JENKINS.

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Sept. 15.

*Trusts and Trustees—Power of Trustees for Syndicate to Sell Land—Purchaser from Trustees—Objection to Title—Necessity for Shewing Terms of Trust—Right of Sole Trustee to Convey to New Trustee.*

In 1914 a large parcel of land was conveyed to an investment company, and a portion of it (now in question) was held by this company until 1926, when, describing itself as "trustee for A. R. Syndicate," it conveyed the portion in question to a trust company, describing the latter company in the same way. Shortly afterwards, the trust company conveyed in the same way to others as trustees, and the latter in May, 1928, as trustees for the syndicate, conveyed the land to N. and H., "trustees for A. R. Syndicate." N. and H. agreed to sell the land to a purchaser, who required either that the *cestui que* trust syndicate should convey or consent to the conveyance, or that evidence should be produced shewing that, under the terms of the trust upon which the land was held, N. and H. were entitled to sell:—*Held*, that the purchaser was entitled to have it made plain that the trustees had the right to sell before he could be compelled to take the title.

*Re McKinley and McCullough* (1919), 46 O.L.R. 535, distinguished. It was unnecessary to consider the purchaser's second objection, that under the Trustee Act a sole trustee has no right to appoint and convey the property to a new trustee. It was pointed out, however, that the decision in *Re National Trust Co. and McLaughlin* (1925), 57 O.L.R. 319, is in conflict with earlier cases, *McLachlin v. Usborne* (1884), 7 O.R. 297, and *In re Shafto's Trusts* (1885), 29 Ch. D. 247.

AN application by a purchaser of land, under the Vendors and Purchasers Act, for an order declaring the validity of objections taken by the applicant to the title shewn by the vendors.

The application was heard by MIDDLETON, J.A., in the Weekly Court, Toronto.

*F. Cawthorne*, for the applicant.

*R. Kennedy*, for the vendors.

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September 15. MIDDLETON, J.A.—An application under the Vendors and Purchasers Act raising questions of considerable difficulty.

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*First.* On the 21st April, 1914, a large parcel of land was conveyed to Toronto Investments Limited. So far as the parcel in question is concerned, and other portions of the original parcel, this company held the land until the 9th April, 1926, when, describing itself as "trustee for Avenue-road Syndicate," it conveyed the lands to the Union Trust Company, describing the latter company in the same way. Shortly thereafter, on the 20th May, 1926, the Union Trust Company, describing itself as trustee for the syndicate, conveyed the lands to Ellis and Nichols, "trustees for Avenue-road Syndicate," and on the 28th May, 1928, Ellis and Nichols, trustees for the syndicate, conveyed the lands to Bruce F. Nichols and Robert B. Henderson, "trustees for Avenue-road Syndicate." These trustees are now selling the land, and the purchaser requires either that the *cestui que trust* syndicate should convey or consent to the conveyance, or that evidence should be produced shewing that under the terms of the trust upon which the land is held the trustees are entitled to sell.

I think the purchaser's position is sound and that the case is not governed by the decision in *Re McKinley and McCullough* (1919), 46 O.L.R. 535. There property had been conveyed to one whose name as grantee in the conveyance was followed by the words "in trust." This took place in 1888. Shortly thereafter the grantee conveyed the land, the purchaser under that conveyance and those claiming under him entering and holding possession for upwards of thirty years. There were two difficulties presented. First, it was said that the words "in trust" were notice of the existence of some supposed trust-instrument, and that the purchaser would therefore have constructive notice of the terms of the trust. To this it was answered that the provisions of the Registry Act adequately protected the purchaser; whatever equitable rights were outstanding were void as against those holding under the registered instrument, constructive notice not being of avail under the Act.

The second branch of the objection was that there was no evidence that under the terms of the trust the trustees had any power of sale. Most exhaustive search had been made and no information as to the terms of the trust or the right of the trustee to sell could be procured. What was held was that after the lapse of upwards of thirty years during which the conveyance had stood

without challenge, possession having gone with the paper-title, it should be presumed that the sale was properly made.

Here there is no difficulty shewn or suggested in ascertaining whether the trustees have the right to sell, and I cannot see any ground for supposing that the trustees who are selling can claim to be relieved from the obligation of shewing that upon the terms of the trust upon which they are holding their action is authorised.

Mr. Justice Magee, who dissented from the view of the majority in the case referred to, fundamentally based his opinion upon the statement that the question which arose was not really different from that which would arise if the trustee himself were selling. This view did not appeal to the other members of the Court, and I fancy that if in the *McKinley* case the trustee had been selling the decision would have been in accordance with the view I am now expressing.

The second objection I do not propose to consider. It is that under the Trustee Act a sole trustee has no right to appoint and convey the property to a new trustee. This is the opinion of my brother Riddell as expressed in *Re National Trust Co. and McLaughlin* (1925), 57 O.L.R. 319. The opinion of my learned brother is in direct conflict with the carefully considered opinion of the late Mr. Justice Ferguson, one of the most careful judges in matters of this kind, expressed in the decision in *McLachlin v. Usborne* (1884), 7 O.R. 297, a decision which has remained unchallenged for almost half a century, and also in conflict with the decision of Mr. Justice Pearson in *In re Shafto's Trusts* (1885), 29 Ch.D. 247, a decision cited in all the text-books as good law and which has never been questioned in England. Quite apart from the general principle that conveyancing decisions which have stood unchallenged and been acted upon for many years ought not to be interfered with by the Courts, leaving the Legislature to act if they are thought productive of harm, my learned brother would have been bound, under the provisions of the Judicature Act, by the earlier decisions, had they been drawn to his attention, as they were not. Under these circumstances I should have enlarged this branch of the motion to be dealt with by a Divisional Court, were it not that my opinion on the other question submitted renders this course unnecessary.

It not appearing that the objection cannot be cleared up without difficulty, I do not make any final disposition of the rights of the parties, merely declaring that in my opinion the purchaser

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 to sell before he is compelled to take the title.

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Re THOMPSON, shewing the trust and the due exercise of a power of sale, and  
 AND  
 JENKINS, the title was accepted.

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[McEVOY, J.]

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RE CAMPBELL.

Sept. 17.

*Will—Construction—Wills of Husband and Wife—Bequests to "Next of Kin" of each—Ascertainment of Classes—Period of Ascertainment—Dates of Deaths of Husband and Wife—Children of Deceased Brothers and Sisters—Descendants of Children—Wills Act, R.S.O. 1927, ch. 149, sec. 36.*

C., who died in 1916, by his will, after a legacy to a church, gave all the "balance" of his estate to his wife during her lifetime, adding: "I wish the balance of my estate after the death of my wife to be divided equally between her and my next of kin share and share alike." His wife survived him and died in 1926. Her will read: "I wish the balance of my estate to be divided equally between my next of kin and the next of kin of my late husband . . . share and share alike. . . . :"—

*Held*, that the words "her and my next of kin" in C.'s will meant his wife's next of kin and his own next of kin.

*Held*, also, that the testator's own next of kin and his wife's next of kin for the purposes of his will were to be ascertained, there being no expressions indicating a different intention, at the date of his own death.

The reasoning in *Re Young* (1928), 62 O.L.R. 275, adopted, but that case distinguished by reason of the difference in the language of the wills.

C. had no descendants; he had no brother and only one sister, who predeceased him, having had four children:—

*Held*, that the next of kin of C. were the children of his sister; and if any child of the sister died either before or after the death of C. leaving descendants, those descendants would take the parent's share by virtue of sec. 36 of the Wills Act, R.S.O. 1927, ch. 149.

*Re Karch* (1921), 50 O.L.R. 509, referred to.

The next of kin of C.'s wife ascertained at the death of C. for the purposes of his will were her brothers and sisters then alive: the statute did not come to the aid of the descendants of the testator's wife's brothers or sisters.

In distributing the estate of C.'s wife under her will, the next of kin of her husband were to be ascertained at the date of her death, and were the children of his sister, but not the descendants of any deceased child, the statute not aiding the descendants of a person who was not a brother or sister of the testatrix.

The next of kin of the wife under her will were to be ascertained at the date of her death, and were her brothers and sisters and the descendants of any deceased brother or sister.



AN application by the executor of the wills of William Campbell, deceased, and of Mary Jane Campbell, his widow, also deceased, for an order determining questions arising in the administration of the estates of both husband and wife as to the meaning and effect of their wills.

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January 12. The application was heard by McEvoy, J., in the Weekly Court, Toronto.

*David Robertson*, K.C., for the applicant.

*G. W. Mason*, K.C., for the children of Thomas Robinson.

*R. L. Kellock*, for the children of Mary Cooper.

*J. M. Macintosh*, for William Robinson.

September 17. McEvoy, J.:—William Campbell died on or about the 16th February, 1916, and Mary Jane Campbell, the widow of William Campbell, died on the 15th September, 1926. This man and wife never had any children.

Probate of the will of William Campbell was granted on the 3rd April, 1916, and of the will of Mary Jane Campbell on the 15th October, 1926, by the Surrogate Court of the County of Grey.

The executor has had his accounts audited and passed by the Surrogate Court of the County of Grey, and it has been found by that Court that of the estate of William Campbell there remains for distribution in the hands of David M. Jermyn, the executor of William Campbell, the sum of \$1,588.22. The accounts of the widow's estate have not been audited, but the executor has in hand for distribution about \$5,000 belonging to the estate of Mary Jane Campbell.

The question to be determined upon the construction of these wills is: Who are the "next of kin" of William Campbell and who are the next of kin of Mary Jane Campbell under the terms of their respective wills?

It will be convenient to deal with the will of William Campbell first. I am of opinion that each will must be construed independently of the other will, although there are some circumstances to lead one to suppose that the two wills were made under an understanding between the man and his wife.

William Campbell in his will says: "I give devise and bequeath all the real and personal estate of which I may die possessed in the manner following that is to say: two hundred dollars to assist the Mathews Presbyterian Church. All the balance of my estate I give to my beloved wife Mary Jane Campbell during her

McEvoy, J. lifetime. I wish the balance of my estate after the death of my  
1928. wife to be divided equally between her and my next of kin share  
and share alike."

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There is no other provision in the will that affects the construction of the will.

Upon the argument I intimated—and it was not strenuously contended otherwise—that the phrase "divided equally between her and my next of kin share and share alike" meant "divided equally between my next of kin and the next of kin of my wife Mary Jane Campbell," and I so hold. The same disposition in effect is a little more plainly made in the will of Mary Jane Campbell, to be considered presently.

William Campbell had no descendants; he had no brother and only one sister. His sister was Mary Campbell, and she married John Cooper, and had four children by him. Mary Cooper predeceased William Campbell. None of her children died leaving issue.

One problem is: Who are William Campbell's "next of kin" under these words in his will? And another is: Who are Mary Jane Campbell's "next of kin" under the same will? To determine this, one must first decide whether the next of kin of William Campbell and of Mary Jane Campbell are to be ascertained at the date of the death of William Campbell or should the next of kin be ascertained at the date of the death of Mary Jane Campbell?

In this Province since the Court of Appeal reversed and the Supreme Court of Canada approved of the reversal of the judgment of the late Chancellor Boyd in *Smith v. Thompson* (1894-7), 25 O.R. 652, 23 A.R. 29, 27 Can. S.C.R. 628, it has been until recently held to be the almost inflexible rule of construction that where, as here, there were first or intermediary dispositions in the will with a final provision that, all earlier dispositions failing, "then to the testator's next of kin," the time of ascertaining the "next of kin" was the date of the death of the testator.

These judgments, reversing the Chancellor, were judgments intending to follow *Jones v. Colbeck* (1802), 8 Ves. 38; *Bullock v. Downes* (1860), 9 H.L.C. 1; and *Mortimore v. Mortimore* (1879), 4 App. Cas. 448. These cases have, since *Smith v. Thompson* was decided, been interpreted by the Lords themselves, and the rule as laid down in the latter cases is expressed in these words by Lord Watson in *Hood v. Murray* (1889), 14 App. Cas. 124, at p. 137:—

"In cases where a testator or settlor, in order to define the persons to whom he is making a gift, employs language commonly descriptive of a class ascertainable at the time of his own death,

he must *primâ facie*, and in the absence of expressions indicating a different intention, be understood to refer to that period for the selection of the persons whom he means to favour. In my opinion, the rule has no other effect than to attribute to the words used their natural and primary meaning, unless that meaning is displaced by the context."

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And again in *Hutchinson v. National Refuges for Homeless and Destitute Children*, [1920] A.C. 794, Lord Finlay says:—

"The question in this as in every other case of the kind must be whether *there is in the will a sufficient indication that the period of distribution is the time* at which the class is to be ascertained."

In *Re Young* (1928), 62 O.L.R. 275, Middleton, J.A., examines and expounds these cases and their effect upon the law of this Province. In that case, *Re Young*, he held that the date of ascertaining the class was the date of distribution. In the latter part of his judgment he indicates that in addition to the "context," surrounding circumstances may be considered in determining the point, as when he says (p. 281): "I cannot conceive it possible that this testator, when he used the words 'I direct my property to be divided amongst my nearest of kin,' meant the great bulk of his estate to go to his wife's relatives."

No good purpose can be served by any further discussion of these cases in the light of this recent judgment in *Re Young*.

The case at bar is not the same in its language as *Re Young*. I am not able to find in William Campbell's will "any expressions indicating a different intention," and I hold under the will that William Campbell must *primâ facie* be understood to refer to the date of his own death as the date for the ascertainment of the class that fits the expression "my next of kin" in his will.

"Next of kin," without any reference to the statutory next of kin, means the nearest blood relations and not the statutory "next of kin:" *In re Gray's Settlement*, [1896] 2 Ch. 802; *Hutchinson v. National Refuges for Homeless and Destitute Children*, [1920] A.C. 794; *Re Young*, 62 O.L.R. 275, at p. 278.

The result is, so far as the next of kin of William Campbell are concerned, that they will consist of the children of Mary Cooper, his deceased sister.

If there is any child of Mary Cooper who was deceased either before or after the death of the testator, leaving descendants, those descendants will take the parent's share by virtue of the Wills Act,

McEvoy, J. now R.S.O. 1927, ch. 149, sec. 36.\* See judgment upon appeal from Logie, J., in *Re Karch* (1921), 50 O.L.R. 509. This result follows notwithstanding the later date of the passing of the statute. It follows under the statute because Mary Cooper was a "sister of the testator." No one of the next of kin of Mary Jane Campbell was a "brother or sister of the testator" William Campbell, so that to ascertain who were the next of kin of Mary Jane Campbell at the death of William Campbell, entitled to share in the half of the \$1,588.22 willed to the next of kin of William Campbell, one must find the next of kin of Mary Jane Campbell at the date of the death of William Campbell, and the quest must be made exclusive of the provisions of the statute.

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The next of kin of Mary Jane Campbell ascertained at the date of the death of William Campbell were her brothers and sisters then alive. The descendant of any brother or sister would obviously be at least one degree further removed than a brother or sister of Mary Jane Campbell, and could not take out of William Campbell's estate because the statute does not come to the aid of the descendants of the testator's wife's sisters and brothers, but to the assistance of the testator or testatrix's brother or sister, to prevent a lapse. Counsel by the application of these findings and holdings can determine the next of kin of William Campbell under his will and the next of kin of Mary Jane Campbell entitled to share under the same will.

Coming now to the will of Mary Jane Campbell, out of whose estate there is some \$5,000 to be distributed by the executor, the same considerations and principles will apply in construing this will, only there is no question but that Mary Jane Campbell's will speaks as at the date of her death, and that the date for ascertaining her next of kin and the next of kin of William Campbell is that date.

The provisions of her will necessary to consider in construing it are these: After directing the payment of her just debts, funeral and testamentary expenses, she says:—

\* 36.—(1) Where any person, being a child or other issue or the brother or sister of the testator to whom any real estate or personal estate is devised or bequeathed, for any estate or interest not determinable at or before the death of such person, dies in the lifetime of the testator either before or after the making of the will, leaving issue, and any of the issue of such person are living at the time of the death of the testator, such devise or bequest shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.

(2) The provisions of this section shall apply to a devise or a bequest to children or other issue or to brothers or sisters as a class.



"I give devise and bequeath all my real and personal estate of which I may die possessed in the manner following that is to say: I wish the balance of my estate to be divided equally between my next of kin and the next of kin of my late husband William Campbell share and share alike except my brother William who is not to receive any share."

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In distributing this estate, the next of kin of William Campbell are to be ascertained as of the date of the death of Mary Jane Campbell. The next of kin of William Campbell are not to include any child or children of a deceased child of Mary Cooper. These are obviously one degree further removed from William Campbell than are the immediate issue of his sister Mary Cooper, and the statute, sec. 36 of the Wills Act, cannot be invoked in this will because the named beneficiary is not a brother or sister of the testatrix. So the next of kin or "nearest blood relations" of William Campbell at the date of the death of Mary Jane Campbell are those children of Mary Cooper who were or are alive at the death of Mary Jane Campbell; and descendants of Mary Cooper's children or any of them do not participate in the half of the \$5,000 under the will of Mary Jane Campbell, but the whole portion goes to the living children of Mary Cooper, share and share alike.

As to the other half of the \$5,000 to be distributed under the will of Mary Jane Campbell to the next of kin of Mary Jane Campbell, that share will be divided between the brothers and sisters of Mary Jane Campbell ascertained as of the date of her death. The descendants of a deceased brother or sister of Mary Jane Campbell the testatrix (excluding William Robinson, who is excluded by the will) will, by virtue of the statute, sec. 36 of the Wills Act, take the share of any deceased brother or sister of Mary Jane Campbell. If counsel find difficulty in ascertaining the next of kin of Mary Jane Campbell in the light of these holdings and findings, the matter may be spoken to again.

Costs to be paid out of both estates in proportion to the size of each of the two estates—the costs of the executor as between solicitor and client.

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## [APPELLATE DIVISION.]

1928.

ADVANCE-RUMELY THRESHER CO. v. ARMOUR.

Sept. 19.

*Sale of Goods—Contract—Warranty—Counterclaim—Appeal—Pleading—Variation of Judgment below.*

The judgment of RANEY, J., 62 O.L.R. 76, was affirmed as to the dismissal of the action, but reversed as to the allowance of the counterclaim.

APPEAL by the plaintiff company from the judgment of RANEY, J., 62 O.L.R. 76.

September 19. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, JJ.A.

*H. F. Parkinson*, K.C., for the appellant company, contended that the defendant could have no recourse against the appellant company under the warranty contained in the contract between the parties, as he had not given notice of the defect complained of within 10 days after the machine was put into operation, as therein provided. The fact that the machine was shipped to the city of Toronto, where it remained on the siding of the railway company "unprotected" and liable to be sold for demurrage charges, came within the acceleration provisions contained in the contract, and rendered the promissory notes given by the defendant in payment immediately due and payable.

*A. H. Boddy*, for the defendant, respondent, was asked to address his argument only to the question why, if the action were dismissed, the counterclaim should not be dismissed also. He contended that the judgment on the counterclaim should stand.

The judgment of the Court was delivered by LATCHFORD, C.J., at the close of the argument:—As the pleadings of both the plaintiff and defendant were defective in that they did not set out sufficiently a cause of action on the part of either party, the judgment below should be varied by dismissing claim and counterclaim with costs, without prejudice to the rights of the parties in any action that may be brought by either against the other.

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## [PRIVY COUNCIL.]

W. C. MacDONALD REGD. v. LATIMER.

1928.

JASPERSON v. PLUMB.

June 12.

*Appeal—Findings of Fact of Trial Judge—Reversal by Appellate Division—Restoration by Judicial Committee—Evidence—Credibility of Witnesses—Accomplice—Corroboration—Conflicting Decisions upon Questions of Fact.*

The judgment of the Appellate Division in *Plumb v. W. C. MacDonald Regd., Latimer v. Foster Tobacco Co. Ltd.* (1926), 58 O.L.R. 322, was reversed and that of MEREDITH, C.J.C.P., *ib.*, restored.

Where an appeal on a question of fact lies, it is within the jurisdiction of an appellate court to reverse a finding of fact; but such a course is only to be adopted upon very clear proof of error where the case depends upon the credibility of witnesses whom the trial Judge has seen and believed.

The evidence of a professed accomplice must be carefully scrutinised with anxious search for possible corroboration.

An appellate tribunal has not to decide which of two conflicting decisions is right, but has to apply well-established principles to the particular case immediately under appeal.

APPEALS by W. C. MacDonald Regd. and George Jasperson from the judgment of the Appellate Division of the Supreme Court of Ontario, *Plumb v. W. C. MacDonald Regd., Latimer v. Foster Tobacco Co. Ltd.* (1926), 58 O.L.R. 322, reversing the judgment of MEREDITH, C.J.C.P., the trial Judge, *ib.*

The appeals were heard by VISCOUNT SUMNER, LORD SHAW, and LORD ATKIN.

*I. F. Hellmuth*, K.C., and *John T. Hackett*, for the appellants W. C. MacDonald Regd.

*John H. Rodd*, K.C., for the appellant Jasperson.

*W. N. Tilley*, K.C., and *G.T. Walsh*, for *Latimer et al.* and *Plumb et al.*, respondents.

June 12. The judgment of the Judicial Committee was delivered by LORD ATKIN:—This litigation arises from a series of transactions which their Lordships think are rightly stigmatised as frauds perpetrated by one Deacon upon farmers who were growers of tobacco in Essex county, in Ontario, in the year 1919. Deacon was at the time the factory manager of a limited company, the Foster Tobacco Company Limited, which carried on business as tobacco manufacturers in Leamington. The Foster company was in 1919 doing little if any business. In June, 1919, Deacon was appointed by the Dominion Tobacco Company of

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Montreal their tobacco buyer for the county of Essex or elsewhere in Ontario for one year on a commission of half a cent per pound. Deacon was not to act as tobacco buyer for any other person except the Foster company, without the Dominion company's written consent. It was alleged by the Foster company that Deacon, being sent to Montreal to obtain this contract for the company, wrongfully obtained it for himself. Apparently this dispute was disposed of by Deacon agreeing to share with the company or with Mr. Brown, the president of the company, the commission earned under the contract.

The Dominion Tobacco Company was a firm, the partners in which were the Messrs. Goldstein. Deacon's authority to buy for the Dominion company was advertised, but he received from the company instructions not to buy more than 300,000 to 350,000 lbs. Burley tobacco and 75,000 lbs. Virginia tobacco. This limitation was not made public. The buying season began in October. Deacon, in fact, bought about 150,000 lbs. of Virginia tobacco and about 1,100,000 lbs. of Burley tobacco. Of the Burley tobacco he bought about 800,000 lbs. in the name of the Dominion company, and about 300,000 lbs. in the name of the Foster company, telling the sellers in the latter case that, though he was using the Foster company's forms, he was in fact buying for the Dominion company. All the Virginia tobacco he appears to have bought in the name of the Dominion company. The Dominion company were handed contracts for the 75,000 lbs. of Virginia tobacco and 300,000 lbs. of Burley. They took delivery, and those quantities disappear from the dispute. The question arises as to the balances. Eventually Deacon, about January, 1920, told the farmers that as to the balance of Burley he had been buying, not for the Dominion company, but on the instructions of one George Jasperson, who had authorised him to buy the tobacco for account of the MacDonald Tobacco Company Limited. The MacDonald company is a wealthy corporation who are manufacturers of tobacco. They had been buyers of tobacco on a small scale in Essex county in 1918, and in 1919 had bought largely, up to 4,000,000 lbs., through Jasperson, a large buyer in the district. Jasperson had employed a staff of about 16 buyers to buy for the MacDonald company, the purchases being made in the name of the MacDonald company and on the MacDonald company's forms. Both the MacDonald company and Jasperson repudiated any responsibility for the purchases. Jasperson denies that he ever authorised Deacon to make any purchases for him, though he acknowledges that he



took over the balance of Virginia tobacco which he says Deacon offered him. The MacDonald company say they gave no authority to Jasperson, express or implied, to buy any tobacco for them except that which was bought on their forms, of which they have taken delivery. The Dominion company in December, 1923, made an authorised assignment under the Bankruptcy Act to trustees. The present appeal to the Board is a consolidated appeal in two actions.

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The action *Latimer and others v. Foster Tobacco Company Limited, George Jasperson, and W. C. MacDonald, Registered*, was an action brought by the farmers from whom Deacon bought on the Foster company's forms. The plaintiffs claim damages for non-acceptance of the tobacco against the MacDonald company, alternatively against Jasperson, and alternatively against the Foster company. In the further alternative they claim damages for fraud against Jasperson and the MacDonald company. The action *Plumb and others v. W. C. MacDonald Registered and George Jasperson* is an action in which those of the plaintiffs who are farmers are those from whom Deacon bought on the Dominion company's forms. These plaintiffs claim damages for non-acceptance against the MacDonald company and alternatively against Jasperson. The plaintiffs, the authorised trustees of the property of the Dominion company, and their assignors, Messrs. Goldstein, claim an indemnity from the MacDonald company and alternatively from Jasperson against all liability incurred by them under the contracts taken in the name of the Dominion company.

The actions were tried before Meredith, C.J.C.P., in December, 1924. He disbelieved Deacon's story that he had been authorised by Jasperson to enter into the contracts in question, and dismissed both actions with costs. On appeal the Appellate Division found that Deacon's story was true. The result, in their opinion, was that in the action on the Dominion contracts, *Plumb v. W. C. MacDonald Registered*, the plaintiffs failed against the MacDonald company on the ground that Jasperson must be taken to have acted without authority in instructing Deacon to buy in the name of the Dominion company; they, therefore, dismissed the appeal against the MacDonald company, but allowed it against Jasperson, giving judgment against him for the farmer plaintiffs for damages for non-acceptance. On the other hand, in the action on the Foster contracts, *Latimer and others v. W. C. MacDonald Registered*, they found no lack of authority in Jasperson to authorise Deacon to buy in the

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name of the Foster company. They therefore gave judgment for the plaintiffs against the MacDonald company for damages for non-acceptance, and dismissed the appeal against Jasperson.

In the action on the Dominion contracts the Appellate Division felt themselves able to give further relief, founding themselves on the decision of the Courts of Ontario and this Board in *Peterson v. Dominion Tobacco Co.*, *Stevenson v. Foster Tobacco Co.*, *Vampary v. Dominion Tobacco Co.* (1921-22), 19 O.W.N. 463, 22 O.W.N. 99; *Jasperson v. Dominion Tobacco Co.*, [1923] A.C. 709. These actions were brought by one of the farmers who had sold on a Dominion contract. They were framed against all the defendants in the alternative on the contract for damages for non-acceptance; and the Dominion company, on a so-called third party claim, though against a co-defendant, claimed damages from Jasperson by way of indemnity against all liabilities on the contract. The trial Judge had accepted Deacon's story; he gave judgment for the plaintiff against the Dominion company and for Jasperson and the MacDonald company on the contract; but he gave judgment for the Dominion company against Jasperson on the third party notice, on the ground that Jasperson had tortiously procured Deacon to commit a breach of his contract with the Dominion company. This judgment was upheld by the Appellate Division, and Jasperson alone appealed from the judgment against him to this Board, who advised the dismissal of the appeal. In the present case, the Appellate Division, relying upon the former decision as creating an estoppel by record as between the Dominion company and Jasperson, made a declaration that the trustees of the Dominion company were entitled to an indemnity from Jasperson against all liability on the contracts mentioned in the pleadings taken in the name of the Dominion company, being all the contracts other than those of which the Dominion company themselves took delivery.

If their Lordships took the view of the facts adopted by the Appellate Division they would yet find themselves unable to give this relief to the trustees of the Dominion company. The liability of Jasperson under this head of claim is in tort, and depends upon the Dominion company establishing that they had suffered damage in fact. No liability in the present action was sought to be established by the plaintiffs against the Dominion company, who, by their trustees, were co-plaintiffs of the sellers and were not defendants. The judgment of the Appellate Division gives judgment for the farmers on the contracts against Jasperson as being the actual principal, and their Lordships cannot accept

the view that when the actual principal is made directly liable on the contract he can also be held liable to indemnify an ostensible principal as though the latter were in fact the party by whom the contract had to be fulfilled. Counsel for the Dominion company, perceiving the difficulty, supported the decision as a proper result if Jasperson escaped liability to the former plaintiffs on the facts, relying on the doctrine of *res judicata* as between themselves and Jasperson. In their Lordships' opinion, however, the failure in the present action to establish any liability of the Dominion company to the plaintiffs is sufficient to dispose of the claim in tort.

Similarly, in any view of the facts, their Lordships are unable to find any evidence upon which the MacDonald company could be made liable upon the contracts in question. It was rightly held by the Appellate Division that the MacDonald company were not liable upon the contracts made in the name of the Dominion company on the ground that Jasperson had no authority to bind them by making contracts in the name of a company in breach of that company's contract with its agent Deacon. It seems to have been overlooked that for Deacon to make contracts in the name of the Foster company, though not in fact for that company, was equally a breach of his contract with the Dominion company, and that Jasperson equally had no authority to employ him for that purpose. In fact, the whole circumstances of Jasperson's actions, as stated by Deacon, appear to be fraudulent and quite outside the scope of any authority given by the MacDonald company. Express authority is negated by two concurrent findings with which their Lordships agree. Their Lordships would therefore, in any case, have to advise that the appeal of the MacDonald company be allowed with costs.

Their Lordships, however, are of opinion that there is not sufficient reason for interfering with the findings of the trial Judge on the question of fact. There was a direct conflict of evidence between Deacon and Jasperson on the issue as to Deacon's authority to buy for Jasperson, and Jasperson's denial was supported by affirmative evidence of statements made by Deacon at material times, which, if believed, appear to be inconsistent with the truth of Deacon's evidence. Such evidence was given by the witnesses Copeland and Goodeve. On the other hand, evidence was given of circumstances such as visits to Jasperson's house, and a statement by Jasperson as to Deacon's possible profits out of the transaction, which tend to support Deacon's story. The trial Judge has accepted Jasperson and

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his witnesses as truthful witnesses. Moreover, the trial Judge has very reasonably taken into account the fact that Deacon, upon whose evidence the plaintiffs must base their case, was, on his own admission, a party to a series of transactions in which he was deceiving the farmers and betraying the confidence of his employers, the Dominion company. By every code of evidence the testimony of a professed accomplice requires to be carefully scrutinised with anxious search for possible corroboration. There is no documentary evidence that clearly affirms the one view or contradicts the other; indeed, the documents, so far as they were examined at the trial, throw little light on the matter. It might appear improbable that Deacon should enter into these transactions unless he could rely on some financial supporter; on the other hand, it would appear improbable that Jasperson would, as Deacon averred, have sent him into the market to buy in competition with his own organised body of buyers. There is no sufficient balance of improbability to displace the trial Judge's finding as to the truth of the oral evidence. The case resolves itself into a simple example of a charge of commercial misconduct based almost entirely on the evidence of a professed accomplice, which the trial Judge, after hearing the accused and his witnesses, has found to be disproved. It must require very cogent proof of mistake by the trial Judge to displace his findings in such a case as that. No one doubts that where an appeal on fact lies, it is within the jurisdiction of an appellate court to reverse a finding of fact; but it is well established that such a course is only to be adopted upon very clear proof of error where the case depends upon the credibility of witnesses whom the trial Judge has seen and believed.

It is unfortunate, no doubt, that in the former trial another tribunal came to a different conclusion on the question of fact. That conclusion was accepted on appeal, and their Lordships note that Hodgins, J.A., in that case, thought that the appellate court could not but accept that view, "as the testimony of these parties is entirely opposed the one to the other, and no appraisal of its value can properly be made except under the conditions and with the advantages possessed by a trial Judge." Their Lordships agree with this and are of opinion that the same principle, applied to the findings in this case, should have led to the dismissal of the appeal. An appellate tribunal in such circumstances has not to decide which of two conflicting decisions is right, but has to apply well-established principles to the particular case immediately under appeal. In the present



case the witnesses were examined and cross-examined afresh, and further and different evidence was given on both sides by different witnesses.

Their Lordships do not find it necessary to review in detail the various circumstances which tend to support or displace the case for the plaintiffs. After careful consideration of all the facts, they are unable to find any sufficient ground for interfering with the findings of the trial Judge. They will, therefore, humbly advise His Majesty that the appeal of both appellants be allowed with costs against the respective plaintiffs here and below, and the judgments of Meredith, C.J., be restored.

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#### [APPELLATE DIVISION.]

QUEEN VICTORIA NIAGARA FALLS PARK COMMISSIONERS v.  
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Sept. 24.

*Contract—Operation of Railways in Park—Powers of Incorporated Railway Company—Agreement with Park Commissioners—Lease or Licence—55 Vict. ch. 96, sched. B. (Ont.)—Sale of Souvenirs and other Articles by Railway Company in Stations—Right of Occupation—Business Incidental to Operation—Estoppel—Crown—Right to Use Stations for Purposes not Inconsistent with Purposes of Incorporation—Rights under Agreement—Ambiguity—Explanation of Clause—Onus—Condition in Operation for many Years.*

The plaintiffs, on the 4th December, 1891, entered into an agreement with certain individuals for the construction and operation of (*inter alia*) two incline railways on the bank of the Niagara river, within the limits of the park property controlled by the plaintiffs as commissioners. The agreement provided for the assignment of it to a company to be incorporated, and it was afterwards assigned to the defendant company, who then began and had since continued to operate the two incline railways. One of these was owned and controlled by an earlier company, from which it was acquired in 1891. By this action the plaintiffs sought a declaration that the defendants were wrongfully carrying on in their station buildings the business of the sale of souvenirs, curios, photographs, and refreshments, on lands under the control of the plaintiffs, an injunction to restrain the defendants from so doing, and damages:—

*Held*, by the majority of the Court, having regard to the provisions of the agreement (set out in full in schedule B. to an Act passed in 1892 incorporating the Niagara Falls Park and River Railway Company, 55 Vict. ch. 96 (Ont.)), that the defendants were not merely licensees, or merely enjoying an easement, but were entitled to the exclusive occupation of their station buildings and of the ground upon which they stood; and, as occupiers, were entitled to carry on in the operation of the railways any business which was reasonably and properly incidental to such operation, and which came within their charter or statutory powers.

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And *held*, that the defendants, in carrying on the sale of souvenirs, etc., which had in the case of one of the railways been carried on by the earlier company, were acting within their statutory powers. Review of the authorities.

*Foster v. London Chatham and Dover Railway Co.*, [1895] 1 Q.B. 711, followed.

*Niagara Falls Park and River Railway Co. v. Town of Niagara* (1899), 31 O.R. 29, approved.

*Held*, also, by the majority of the Court, that the plaintiffs were estopped by their conduct from objecting to the sale of souvenirs, etc. (the doctrine of estoppel in pais operating even as against the Crown).

*North Eastern Railway Co. v. Lord Hastings*, [1900] A.C. 260, distinguished..

*Per* HODGINS, J.A.:—The sale of souvenirs is in no sense incidental to the conduct of a railway, but the buildings in which the business is carried on were part of the defendants' property, so far as their lease or licence provided for and contemplated their occupation, and the defendants had the right to use them for any purpose not inconsistent with the operation of the railway, nor of such a nature as to prevent or hamper the carrying out of the purposes for which the defendants were incorporated, either physically or by conferring rights inconsistent with the proper operation of the railway.

Certain words in clause 12 of the agreement, dealing with the acquisition of the incline railway then existing, refer to rights claimed but not admitted which were to be acquired. In the absence of any attempt by the plaintiffs to explain the words as referring to anything other than the business of selling fancy goods, etc., the Court should not lightly disturb a condition in operation for so many years, and hold it to be outside the lease or licence granted to the defendants.

An action for a declaration and an injunction in respect of a business carried on by the defendants upon the lands of the plaintiffs as set out below.

The action was tried before FISHER, J., without a jury, at Welland.

*J. S. Beatty*, for the plaintiffs.

*Wallace Nesbitt*, K.C., and *Christopher C. Robinson*, K.C., for the defendants.

December 31, 1927. FISHER, J.:—The plaintiffs' claim is as Commissioners and Trustees of the Queen Victoria Niagara Falls Park, acting in the execution of statutory powers conferred upon them (see the Queen Victoria Niagara Falls Park Act, R.S.O. 1914, ch. 50), for a declaration that the defendants are wrongfully carrying on the business of the sale of souvenirs, curios, prints, photographs, and refreshments, on lands belonging to the plaintiffs, and for an injunction restraining them from so doing.

At the opening of the trial, the defendants asked and I permitted them to amend their defence by adding the Statute of Limitations.

There are two incline railways involved in this action, (1) situate in the vicinity of the Whirlpool Rapids—which I shall refer to as “the Whirlpool incline”—and (2) situate near the Clifton House—which I shall refer to as “the Clifton incline.”

The Whirlpool incline had been in operation for many years prior to the 4th December, 1891, and it is not denied that souvenirs, curios, etc., were sold in connection with its operation since 1885.

The Clifton incline and buildings, shewn in the photograph (exhibit 4), were constructed by the defendants in 1894, and it is submitted by the defendants that since that time they have, in connection with the operation of both incline railways, sold souvenirs, curios, etc.

The defendants acquired the Whirlpool incline and constructed the Clifton incline and building under and subject to the terms of a written agreement, dated the 4th December, 1891. The agreement is set out in full schedule B. to the Act incorporating the Niagara Falls Park and River Railway Company, 55 Vict. ch. 96, 1892, Ont. Clause 1 of that agreement reads:—

“The commissioners do hereby license and permit the company to construct a first class electric railway with single or double tracks as may hereafter be agreed upon between them and the company in and through the park proper from its northern to its southern boundary and on and over the other lands of the commissioners from the northern boundary of the park proper to a point in or near the village of Queenston, and so far as the licence of occupation recently obtained by the chairman of the commissioners from the militia department extends, and the commissioners will provide the right of way therefor of the required widths the railway herein referred to being part of the high level railway and the same shall be in accordance with the provisoes conditions and agreements hereinafter contained.”

Paragraph 11 refers to the construction, etc., and reads:—

“The company shall have the right to construct and operate inclined railways and elevators at such points north of the Niagara Falls ferry as may be approved of by the commissioners, and the company may use such portions of the chain reserve and thence down to the water as may be required for such construction and operation. The company shall also have the right to acquire and operate such inclined railways and lifts which have

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already have constructed north of the ferry together with the machinery and works connected therewith upon payment in cash to the proprietors or occupiers thereof respectively of the amount that may be fixed by arbitration or by private arrangement or otherwise for obtaining possession from the present occupiers thereof, including costs incurred by the commissioners. The company may exercise and the commissioners do hereby empower the company to exercise such rights and powers as the commissioners possess in respect of the acquisition of such works, and, if necessary, the company may do so in the name of the commissioners."

Paragraph 12 refers to the acquiring of other railways, and reads:—

"The company shall and they do hereby undertake that they will with due diligence and within a reasonable time, and without any delay that is avoidable, and not later than six months from the date hereof, take steps to acquire the rights and properties in the next preceding paragraph mentioned, including the rights now claimed by occupancy or otherwise, and will pay the compensation money therefor so soon as the same has been ascertained, and the costs of the commissioners aforesaid, and on the acquisition thereof the company shall hold the same under the commissioners free from any claim against the commissioners by or in right of said proprietors or occupiers, which holdings under or attachments to the commissioners shall not make the company liable to pay any rents other than they have herein agreed to pay," etc., etc.

Prior to the construction of the Clifton incline and building, the defendants were compelled to and did submit to the plaintiffs certain plans and drawings, which plans and drawings were approved by the defendants before the construction was proceeded with. The approval is to be found in certain letters put in by the defendants, subject to objection, as exhibit 5. The letter of the 30th April, 1924, from the chairman of the park commission to the superintendent of that commission reads:—

"I have your letter of the 28th (acknowledged to-day) in respect to the incline at Clifton House, and I had a long conversation with Mr. Osler this morning in respect of the matter. He seems to think that the capital expenditures for the incline on the plan that I proposed would be largely increased, as doubtless they would, and would like to go on with the first plan, if possible. I informed him that the commissioners could not approve of the upper structure at the point selected. I further stated



that I felt convinced that the placing of the structure at a point near the railroad platform would increase the traffic on the incline to an extent that would warrant the greater cost. Provided we give him the right to sell fancy goods in the structure, I think he will decide to accept our suggestions. I see no objection to allowing a shop to be carried on in the structure; indeed, I don't know that we have any right to oppose it. The style and dimensions of the structure proposed, however, will require to be very carefully considered, and I would be glad if you could sketch out some plan which you think would be suited to the location."

A letter between the same parties, dated the 15th May, 1894, reads:—

"Referring to your letter of the 11th inst. and the accompanying sketch of the proposed incline to the ferry landing and also to the meeting that took place between the electric railway authorities and the park commission on Saturday, I now beg to state that the structure may be proceeded with, provided of course that the provision in the agreement of 4th December, 1891, is complied with in respect to the character of the structure. Be good enough to instruct the electric railway company to have the drawings prepared and submitted to the park commission for approval."

In the letters patent incorporating the Whirlpool incline, which the defendants acquired, a statement of its powers reads:—

"The operating of an elevator or tramway and stairs as a means of communication between the top of the bank of the Niagara river and the water's edge of the said river in the said town of Niagara Falls, the conveying and conducting of visitors down and up the said bank and along the margin of the said river and into and through the premises known as the Whirlpool Rapids Park, the collecting of fares, the selling and dealing in fancy goods, the carrying on of photograph business, and the doing and carrying on of the work incidental to and connected with the said business."

The plaintiffs did not call any witnesses. The defendants called C. A. Miller. He swore that since 1885 photographs and souvenirs and curios, etc., have been sold in the building at the top of the incline in connection with the operation of the Whirlpool incline, since 1885, and in the building at the Clifton incline a like business was carried on since 1895 in connection with the operation of that railway; that the plaintiffs have for years, in connection with the operation of their incline railway at Table

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Rock, sold souvenirs, curios, etc.; that there are several other incline railways in the park, and, in connection with these, photographs, souvenirs, curios, etc., are sold; that the operation of an incline railway would not be profitable without the right to sell these articles, and that it is one of its chief sources of revenue; that no part of the building has seats or any accommodation for passengers and has always been occupied and used for the sale of souvenirs, curios, and fancy goods business; that the building is only used for the purpose of permitting passengers to pass through it to get down to the incline railway.

The next witness was William Laughlin. This witness corroborated the evidence of Miller, and added that he had for the past 13 years sold photographs, etc., in connection with the operation of the Whirlpool incline.

The defendants put in the pleadings in an action brought on the 19th July, 1895, by Zyback *et al.* under a lease (giving them the right to sell, in the park proper, photographs, curios, etc.), against Slater, Miller, and others, to restrain the defendants from selling in the park the same kind of articles as are the subject of this action.

This action came on for trial before the late Chief Justice Falconbridge, but no judgment was given, as according to that learned Judge the proper parties were not before the Court. He made an order that unless the present plaintiffs were added as party plaintiffs within 30 days, the action should be dismissed. An order was made adding the present plaintiffs as party plaintiffs, and the pleadings were amended, but the action never went to trial.

The defendants tendered as evidence in the Zyback action an affidavit made by the late Sir Edmund Osler on a motion for an interim injunction, and also certain depositions put in at a preliminary stage of that action. Admission of this evidence was objected to by counsel for the plaintiffs, and I ruled that it was not admissible, because the present plaintiffs were not parties to that action and had no opportunity to cross-examine on the affidavit and were not bound by what was said or done.

Counsel for the plaintiffs contends that under the December agreement, *supra*, the defendants have no right to sell souvenirs, curios, etc., and that there is no estoppel as against the plaintiffs, who are the Crown in the right of the Province.

I will note here that on the argument I inquired of the plaintiffs' counsel why the plaintiffs, after allowing the defendants for so many years to sell these articles, without objection,

now claimed the right to stop them. Counsel's reply was: "The plaintiffs have just wakened up to the fact that the defendants have no right to sell on our property." This, I think, is not correct, in view of the fact that the plaintiffs were added as party plaintiffs to the Zyback action in 1895, and the defendants' rights in that action were squarely before the plaintiffs.

As to the Whirlpool incline, the defendants contend that under the December agreement they were bound to take over this railway and its undertaking as a whole, and that that included the business rights and properties, building, machinery, and works, and the right to sell these articles, which had always been sold, and under the charter (which the defendants acquired) they were entitled to sell as something reasonable and incidental to and connected with the operation of the railway.

As to the Clifton incline, the defendants' contentions are: (1) that they were bound to construct this railway and operate it in the same manner as the Whirlpool incline had been carried on; (2) that the defendants did construct this railway and operate it in the same manner as the Whirlpool incline without objection since 1895; (3) that the plaintiffs are estopped by their conduct, and the doctrine of equitable estoppel is applicable as against the Crown; (4) that they have acquired an easement; and (5) they plead the Limitations Act, R.S.O. 1914, ch. 75, sec. 35, and other sections.

I will deal first with the Whirlpool incline. On the evidence, oral and documentary, it seems to me that, when the plaintiffs entered into the December agreement, they knew that for several years prior thereto, souvenirs, curios, etc., had in connection with the operation of this railway been sold in the building at the top of the incline to tourists and others using the railway, and that, as the agreement bound the defendants (or their predecessors) to acquire by purchase that railway, the proper construction and meaning to be applied is that it included the building and the business formerly conducted therein, the machinery and works and all the incidental rights and properties of that railway, and one of these rights was, as incidental to its operation, the privilege of selling souvenirs, curios, etc., to tourists and others using the railway.

The same meaning must also be applied in the construction of the Clifton incline by the defendants under the December agreement, as, in my opinion, it was never the intention of the parties to operate these two inclines differently. My view is that this incline was to be constructed for and to be operated by the

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defendants in the same manner as the acquired Whirlpool incline, and I come to this conclusion for the following reasons: (1) the positive knowledge of the plaintiffs that in the operation of these and all other incline railways in the park it was the settled practice to permit the sale of these articles in aid of the revenue of the companies; (2) that the plaintiffs insisted, before the defendants were permitted to proceed with the construction of the Clifton incline, that they submit their plans and drawings to them; (3) that plans and drawings were submitted and approved by the plaintiffs, and included the construction of a building of the same type, or nearly so, as the building at the Whirlpool incline, which building according to the evidence must have been intended for the purpose of selling such articles, as no provision whatever was made for the accommodation of passengers or tourists other than the entrance at one point to permit persons intending to use the railway to enter to get to the incline; and as to both inclines (4) there is no restriction or limitation in the agreement of the defendants' right to sell these particular articles. I think it never could have been intended that these buildings were to stand idle and unoccupied, and a pertinent question to be asked is, what was the purpose of the construction of these buildings unless it was to carry on in them the business of selling these articles as they appear to have done, and no other business, since they were erected?

I find that the business of selling these articles is not an objectionable one, and the best evidence is that it was, as stated, the common practice of all the incline railways in the park, including the one operated by the plaintiffs at Table Rock, to sell these articles in connection with the operation of incline railways.

In *Foster v. London Chatham and Dover Railway Co.*, [1895] 1 Q.B. 711, 718, the question was whether a railway company authorised by special Act to acquire lands for the purposes of a viaduct only could conduct a mercantile business in shops underneath the arches of the viaduct, and the Court held it could, because it was something incidental to the building and the operation of the viaduct.

Could it be said that, if A. obtained from the Crown the right to erect a railway station on its property in a city, A. could not in the construction of that railway station provide for shops and to sell to persons using the railway from these shops such articles as newspapers, periodicals, photographs, curios, and fruit and food, as something incidental and necessarily connected with that station? I think it could not, and, if I am right, I am unable



to see how the plaintiffs are, after all these years, entitled to say to the defendants that they have not a similar right to sell to the thousands of people who visit the park the articles mentioned in the pleadings.

Having found that the agreement authorised and entitled the defendants to sell these articles, it is not necessary that I should refer to the question of the plaintiffs permitting this sale outside of the agreement.

The action will be dismissed with costs.

The plaintiffs appealed from the judgment of FISHER, J.

February 29 and March 1. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and GRANT, JJ.A.

*G. H. Kilmer*, K.C., and *J. S. Beatty*, for the appellants, contended that the defendants' rights were to be measured by the instrument creating them. See the agreement in the schedule to 55 Vict. ch. 96. When the rights were acquired by the defendants they were to hold them under the commissioners and were not to pay anything more under the old agreement. This is the controlling agreement. It has not been shewn in the evidence that the rights which they now seek to exercise were held or passed on by the new agreement. The use of the property cannot affect the rights of the parties under the agreement. It is clear that at no time was exclusive possession granted to the defendants. They were given merely a licence and not a lease of any property of the appellants. Estoppel does not apply. A permission, no matter how long-continued, to do an act not authorised by the original contract, does not affect the rights of the parties: *North Eastern Railway Co. v. Lord Hastings*, [1900] A.C. 260. Even if a licence could be implied, that licence could be rescinded by the appellants at any time. It is not clear that the commissioners had the power to grant the rights claimed; but, assuming that they had, no such right was expressly granted under the agreement, as it must have been to be valid. The agreement to operate the railway was only valid in that it was ratified by Act of Parliament. The only right given was to construct and operate a railway. It was leave to exercise a right over the land of the appellants, which could be extended by the action of the parties.

*R. S. Robertson*, K.C., for the defendants, respondents. The privilege of carrying on the business complained of has been long enjoyed as a matter of right. In such circumstances the Court will presume everything that it can rationally presume in favour

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of the right: *Rogers v. Brooks* (1784), 1 T.R. 431, note; *Mayor of Penryn v. Best* (1878), 3 Ex. D. 292; *Phillipps v. Halliday*, [1891] A.C. 228, at p. 234. It should be presumed that there were proper grants of rights which have long been exercised. The agreement, as confirmed by statute, is not the final contract between the parties. There were further negotiations as to the mode of carrying out the agreement. The appellants do not make out a case here merely by proving that they were the owners of the land and that the defendants were carrying on a business not authorised by agreement. Under the agreement as ratified by statute, the commissioners were authorised to give powers necessary to operate the railway and provide conveniences for customers. Pursuant to that power the defendants were given a lease for the purpose of erecting and conducting an incline railway. This is a lease as regards the premises or store where the business is carried on. The words of the agreement (clause 11) are broad enough to permit a demise, and therefore a demise may be presumed. Exclusive possession was essential. The respondents are tenants and not mere licensees, and are entitled to do on the premises what they are not prohibited from doing: *Foster v. London Chatham and Dover Railway Co.*, [1895] 1 Q.B. 711. The agreement should be interpreted in the light of the circumstances, and the business is clearly ancillary to the operation of the railway and was in contemplation of the parties at the time of the agreement and at all times since. Estoppel does apply. Reference to *Plimmer v. Mayor etc. of Wellington* (1884), 9 App. Cas. 699; *Attorney-General for Trinidad and Tobago v. Bourne*, [1895] A.C. 83; *Attorney-General to the Prince of Wales v. Colom*, [1916] 2 K.B. 193, at p. 204. There may be equitable estoppel against the Crown arising out of the conduct of the parties. In any event the respondents have established a right by prescription: Limitations Act, R.S.O. 1927, ch. 106, sec. 34. If they have not a lease, they have an easement. The buildings have been erected and used as complained of for more than 20 years.

September 24. GRANT, J.A.:—This is an appeal from the decision of Fisher, J., pronounced on the 31st December, 1927, after a trial without a jury, the plaintiffs' action having been dismissed with costs.

The plaintiffs sought by this action a declaration that the defendants were wrongfully carrying on the business of the sale of souvenirs, curios, photographs, and refreshments on lands under the control of the plaintiffs, an injunction to restrain the

defendants from so doing, and damages. The material facts are briefly as follows.

The plaintiff commissioners have been appointed and act under the provisions of a special statute, formerly R.S.O. 1914, ch. 50, and now to be found in R.S.O. 1927, ch. 81 (Niagara Parks Act).

The defendants operate, *inter alia*, what are known as incline railways, on the bank of the Niagara river, and situate upon a portion of the park property. In addition to what are known as the incline railways, the defendants operate a level railway line or lines running along and generally parallel to the river, but these latter railway lines are not involved in the problem to be solved.

There are two incline railways which enter directly into the subject-matter for present consideration. One of these, which is known as the Whirlpool incline, was owned and controlled by an earlier company, from which it was acquired in 1891 or shortly thereafter. According to the testimony of witnesses, the sale of souvenirs, curios, etc., had been carried on in the station building connected with the Whirlpool incline at least as far back as 1885, and was still being carried on at the time of the acquisition of this incline railway by the defendants in 1891, of which more hereafter. The sale of souvenirs, etc., continued to be carried on by the defendants after the acquisition of this incline railway by them, down to the present time.

The Clifton Incline Railway is the other one with which this litigation is concerned. It is situated on the bank of the river near the Clifton House, from which it takes its name for ordinary purposes, to distinguish it from the Whirlpool incline.

On or about the 4th December, 1891, the plaintiff commissioners entered into an agreement with certain individuals, providing for the construction and operation of the level railway and also of incline railways within the limits of the park property controlled by the commissioners. The agreement, a copy of which is to be found in schedule B. to chapter 96 of the statutes of Ontario for the year 1892, provided for the assignment thereof to a company to be incorporated for the purpose of carrying out the provisions of the agreement, and pursuant thereto the agreement was afterwards assigned to the present defendant company.

The Clifton incline and station building, the latter being shewn in the photograph exhibit 4, were constructed and erected by the defendant company in 1894, since which time the defendants have, within such station building, carried on the sale of

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souvenirs, curios, etc., as had previously been done in the station building in connection with the Whirlpool incline already mentioned. It will be found on perusal of the agreement that, in lengthy recitals, there are set forth the purposes and intentions of the parties thereto looking to the construction of a "high level railway," a "low level railway," and certain incline railways, and that the company which was to be incorporated should assume all the liabilities and engagements which were incurred or entered into by the individuals who were parties to the contract itself. The recitals also provide that the commissioners are to furnish the other parties a right of way for the railways to be constructed.

In the operative part of the document many of the details connected with the construction and operation of the railways are set forth, but to these no special reference is necessary. The following are certain paragraphs taken from the agreement, and to which special reference is expedient:—

[Paragraphs 1, 11, and 12 of the agreement are set out by GRANT, J.A., and will be found in the judgment of FISHER, J., *supra*. The other paragraphs set out in the judgment of GRANT, J.A., follow.]

"10. The company shall not erect any buildings or sheds within the limits of the park proper without special permission from the commissioners, and shall not carry on any work thereon that will in any way disfigure it, of which works, whether disfiguring or not, the commissioners are to be the sole judges. The company are to have the full use of all plans and surveys in possession of the commissioners or made at their instance, but such plans and surveys are not to be taken as the decision of the commissioners in respect of any works herein agreed to be done or which may hereafter be proposed to be done."

"16. The company may commence the construction of the said railway whenever the location has been decided upon by the commissioners, and the plans and specifications approved in accordance with paragraph 3 of this agreement, and the right to operate the same shall begin on the first day of September next, or so soon (before or after that date) as the said railway or any section thereof has been constructed and is ready for operation, and shall extend to a period of forty years from the said first day of September, one thousand eight hundred and ninety-two, and shall be renewable on the request by the company for a further period of twenty years as hereinafter provided."

"18. If the company desire to renew for such further period of twenty years, notice of such desire to renew shall be given by



the company to the commissioners in writing at least twelve months before the expiration of the forty-year period.

"19. In addition to all other payments to be made by the company to the commissioners as hereinbefore stated, for right of way and for the privileges hereinbefore mentioned, the company shall pay to the commissioners a clear annual sum of ten thousand dollars by way of rental for each and every year until the termination of the said period or term of forty years and if the company exercise the option of operating the said railway for the second period they will pay to the commissioners, by way of rental, the sum which may be mutually agreed upon as such rental, or which may be fixed by arbitration as aforesaid. All payments to be made to the commissioners quarterly, and to be calculated from the first day of September, one thousand eight hundred and ninety-two, whether the railway be completed or not. The rent shall be paid although the company may not by virtue of this agreement be able to exercise the rights and powers to construct and operate the said railway, it being understood that the commissioners do not guarantee the rights, interests and franchises hereby conveyed to the company, and do not covenant for the quiet enjoyment thereof, except as against the acts of the commissioners and their successors, and any one claiming by, through or under them."

"29. Subject always to the terms and provisions of this agreement, and to the rights of the commissioners as the owners in fee simple of the right of way in the park proper and on the chain reserve, the said railways and their equipment and the other works constructed or required under this agreement shall, upon such construction or acquisition, as the case may be, be vested in and shall be the property of the company, who shall, subject as aforesaid, be entitled to operate, manage and control the same during the period or periods respectively above mentioned, it being however hereby declared, understood and agreed, that at the end of the said first or second period, as the case may be, the whole of the company's said high level railway from Queens-ton to Chippawa, and the said low level railway, if then held by the company under this agreement, together with their equipment and the machinery and works aforesaid, including the elevators or lifts acquired or built and including also the works in Queens-ton and Chippawa, shall become the property of the commissioners, subject to the payment of compensation to be agreed upon or awarded as the case may be, and as is hereinbefore provided for."

"31. The rents hereby agreed to be paid are hereby declared

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to be a first and preferential charge upon the said railways and works, and the company shall not create any lien, charge or incumbrance upon the said railways or works or any of them by bond, debenture, mortgage or otherwise which will interfere with or prevent the commissioners from procuring payment of the rent hereby reserved or any part thereof, and no simple contract creditor or other creditor of the company is to have any claim against the said railway or works or any part thereof in priority to the claim of the commissioners for rent."

It is of interest to note that in various other paragraphs of the document references are made to the "rent," "annual rental," "the rent hereby reserved" and providing that the same should be a first and preferential charge upon the railways and works of the company.

The defendant company proceeded in 1894 to construct the Clifton incline, together with the station building in connection therewith, a photograph of which is to be found in exhibit 4. The location of this incline was agreed upon with the commissioners, and the plans for the building were submitted for approval before any construction work was undertaken.

The contentions of the plaintiffs are, in substance, that the defendants have merely a licence authorising them to construct and operate the railways, and are not tenants; that they have no exclusive possession of the lands occupied; that the defendants' rights, in respect of the use of the premises, must be limited strictly to those set out in the agreement, and therefore that the defendants have no right to carry on the sale of souvenirs, curios, etc., and should be enjoined from continuing so to do. The learned trial Judge has found against the plaintiffs, and from his decision they now appeal.

Careful consideration of the agreement between the parties has convinced me that it is much more than a mere licence.

In the first place, it may be taken as settled that the substance rather than the mere letter of the agreement between the parties will be considered when determining the nature of their arrangements and their rights and obligations thereunder. As was said by Lord Davey in delivering the judgment of the Judicial Committee in *Glenwood Lumber Co. v. Phillips*, [1904] A.C. 405, at p. 408, "It is not . . . a question of words, but of substance," after he had mentioned that the so-called licence had been referred to in different places as a "lease" and a "licence." In the case at bar, the agreement provides for the construction and operation by the defendants of a first-class electric railway

upon and through the park property. The plaintiffs undertake to provide the right of way, of the required widths. Bridges are to be built, the road is to be properly ballasted, and all structures are to be built by the defendants according to plans, etc., to be approved by the plaintiffs. The actual location of the right of way and of the sidings, etc., is to be determined by the plaintiffs, but, be it noted, once the location is determined, it remains fixed for the term of the agreement, in the absence of any new arrangement between the parties. The plaintiffs have no right under the agreement to require the defendants to move their railways or inclines from one location to another. Once the location was approved and the railway constructed, the defendants, subject to fulfilment of the conditions of the agreement, were entitled, not only against all others, but also as against the plaintiffs themselves, to operate that railway in that very location, for the forty-year term and any renewal thereof. The plaintiffs had no power to stop them from doing so, nor had they any right or power to make the defendants move their railway from that location to any other.

In this respect the case at bar is to be distinguished from *Smith v. Lambeth Assessment Committee* (1882), 10 Q.B.D. 327, cited by counsel for the plaintiffs. In that case, as was pointed out by Brett, L.J., on p. 330, the bookstalls were movable at pleasure, for it was for the company to direct where they were to be placed. The licensees had no right to any certain or definite location, throughout their term, as have the defendants in the case before us. It was held upon the facts in that case that the grantees had merely an exclusive enjoyment, and not an exclusive occupation. As was stated by Baggallay, L.J. (p. 330), "the railway company (the grantors) did not part with the possession of any part of their station, but merely conferred upon Smith & Son an exclusive right."

I note further that, by para. 8 of the agreement in the case at bar, the defendants were required to pay to the plaintiffs in respect of certain portions of the right of way lying outside of the park proper, and which the plaintiffs had contracted to purchase from the previous owners for right of way purposes, the sum of \$10,000, and the defendants were not to be liable to the plaintiffs for any other land damages, and were expected to procure for themselves any additional lands required. At terminal points the defendants were bound to construct proper wharves to receive steamers, etc.

By para. 13, the plaintiffs are bound not to confer upon any

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other persons the right to construct railways, tramways, or inclined railways, within the stated district, and also covenant that they will not themselves engage in any such construction or operation. The defendants are required to pay during the forty-year term "a clear annual sum of ten thousand dollars by way of rental," etc. In certain events, in respect of the proposed "low level railway," the defendants were bound to pay "a further annual rental" of \$7,500.

By para. 29 (*supra*), subject to the provisions of the agreement and to the rights of the plaintiffs as owners of the fee simple of the right of way in the park proper, it is provided that the railways, their equipment and "the other works constructed or required" (?acquired) under the agreement shall "be vested in and shall be the property of the company, who shall . . . be entitled to operate, manage and control the same during the period . . . above mentioned." The permanent character of the station building will be apparent upon an inspection of the photograph (exhibit 4).

The decision in *Pimlico Tramway Co. v. Greenwich Assessment Committee* (1873), L.R. 9 Q.B. 9, is founded upon a state of facts somewhat similar to the present. The question there involved was whether the tramway company was ratable to the poor rate or not; if occupiers of the soil upon which their lines were constructed, they were ratable; if merely licensees or enjoying merely an easement, they were not ratable. It was held that they had the exclusive occupation of that part of the highway upon which their rails were laid, and not merely a way-leave or right of way over it. As Lush, J., stated (*vide* p. 15), "I do not think they are the less occupiers because the public still have the right of passing over the surface of their iron road."

A somewhat analogous case was the subject of a decision by the House of Lords in *Cory v. Bristow* (1877), 2 App. Cas. 262. The owners of a derrick-hulk, used for lightering coal, and which was held by moorings set into the bed of the Thames river, were held ratable in respect thereof as occupiers of the portion of the bed of the river in which the moorings were set. Some importance was attached by the Lord Chancellor (p. 272) to the fact that the moorings were the property of the owners of the hulk, and were put down at their expense. It is to be noted in passing that in the case at bar the construction of the railways, including station buildings, was done by the defendants and at their own expense.



Cases dealing with advertising hoardings and bill-boards, such as *Wilson v. Tavenor*, [1901] 1 Ch. 578, are clearly distinguishable upon the facts.

The decision of the Privy Council in *Glenwood Lumber Co. Ltd. v. Phillips*, [1904] A.C. 405, contains some helpful statements of law bearing upon the question under consideration. In that case a licence to cut timber had been given by the Newfoundland Government. On the one side it was contended that the respondents merely had a right to cut and carry away timber, and had no exclusive possession or right of occupation of the lands. The respondents claimed that they were in effect lessees, and entitled to maintain trespass against the appellants, and the Committee gave effect to that contention. In delivering judgment Lord Davey (*vide* p. 408) uses the following words:—

“The appellants contended that this instrument conferred only a licence to cut timber and carry it away, and did not give the respondent any right of occupation or interest in the land itself. Having regard to the provisions of the Act under the powers of which it was executed and to the language of the document itself, their Lordships cannot adopt this view of the construction or effect of it. In the so-called licence itself it is called indifferently a licence and a demise, but in the Act it is spoken of as a lease, and the holder of it is described as the lessee. It is not, however, a question of words but of substance. If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself.”

The agreement now under review, and the rights and position of the company (the present defendants) thereunder, were under consideration by the former Chancery Divisional Court in the case of *Niagara Falls Park and River Railway Co.* (the defendants' predecessors) *v. Town of Niagara* (1899), 31 O.R. 29. The question for decision was as to the liability of the railway company to assessment in respect of its railway, etc., through the park, and in the consideration of that question the Court was called upon to consider with some care the effect of the agreement with the present plaintiffs. For the railway company it was there contended that the commissioners had merely given them a licence to use a portion of the park, and that the rent paid was for a “right of way” only. The following are passages taken from the opinions of Boyd, C., and Ferguson, J., respectively:—

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Boyd, C., at p. 33: "That the occupation of highways by the rails and roadbed of a tramway is ratable is established by *Pimlico Tramway Co. v. Greenwich Assessment Committee*, L.R. 9 Q.B. 9, a case recognised by the House of Lords in *Holywell Union Assessment Committee v. Halkyn District Mines Drainage Co.*, [1895] A.C. 117; it is there decided that the rails occupy a portion of the soil, and are exclusively used for the purposes of the tramway, whereby the company became occupiers of that portion of the soil. 'I do not think they are the less occupiers,' says Mr. Justice Lush (9 Q.B. at p. 15) 'because the public still have the right of passing over the surface of their iron road.'

"There is the actual, visible, continuous and exclusive possession of the roadway for the profitable use and operation of the railway for a term of forty years. I am not much concerned as to the nature of the licence secured or manifested in the agreement between the company and the commissioners, which is ratified by the statute.

"But I think it is very much more than an *easement* or *licence* and is in truth a letting of the right of way at a yearly rental for a period of forty years: see secs. 1, 4, 6, 8, 13, 16, 19, 29, 32 of the agreement schedule B. 55 Vict. ch. 96 (O.)

"The words 'licence and permit' at the beginning are sufficient for a demise; thus in the Touchstone, para. 272, 'If A license B. to enjoy such a piece of land for twenty years, this is a good lease;' and see *Doe d. Parsley v. Day* (1842), 2 Q.B. 147, at p. 152; *Taylor v. Overseers of Pendleton* (1887), 19 Q.B.D. 288. And to enjoy a right of way in railway parlance is equivalent to an enjoyment of the strip of land itself, and not mere right of passage over or along it: *New Mexico v. United States Trust Co.* (1898), 172 U.S. 171, at p. 182."

Ferguson, J., after quoting from several paragraphs of the agreement, states (at p. 39):—

"I have perused with care all the authorities which were referred to, and I have arrived at the opinion and conclusion that the plaintiffs were and are occupants of the land on which their railway is laid.

"In the case *Toronto Street Railway Co. v. Fleming* (1875), 37 U.C.R. 116, at p. 127, Mr. Justice Patterson said, 'The plaintiffs in this case are doubtless occupiers of land,' referring to *Pimlico Tramway Co. v. Greenwich Assessment Committee*, L.R. 9 Q.B. 9. See also the remarks of Mr. Justice Burton at the foot of p. 122. This case is now said to have been overruled; but that is

indifferent as to the use I am seeking to make of these expressions, and the opinion I have imbibed from a perusal of the English cases accords with this view."

Robertson, J., concurred in the judgment of the Chancellor.

Had the company been licensees merely, or merely enjoying an easement, they would not have been assessable.

In my opinion, the defendants, under the said agreement, were entitled to the exclusive occupation of their station buildings and of the ground upon which they stand; and, as occupiers, are entitled to carry on, in the operation of the railways, including any inclines, any business which is reasonably and properly incidental to such operation, and which comes within their charter or statutory powers.

In view of the decision of the Court of Appeal in England in *Foster v. London Chatham and Dover Railway Co.*, [1895] 1 Q.B. 711 (a decision that has been frequently followed, and the correctness of which so far as I am aware has never been questioned), I do not think it can be successfully argued that the defendants would not be within their powers in carrying on the sale of souvenirs, curios, and refreshments in their stations as well as within their trains or cars. See, in particular, the remarks of Lord Halsbury upon the question of incidental powers, on pp. 716 and 718 of the above report.

Apart from the above, I am clearly of opinion that, in this regard, the defendants were quite within their powers, as defined in the charter of their predecessors, as to the Whirlpool incline (see charter, exhibit 1), and in the statute already mentioned, to which the agreement is a schedule.

Upon this ground, therefore, in my opinion, the judgment appealed from is right.

I am also of opinion that the appeal must fail on the ground of estoppel. By para. 11 the defendants are given the right to acquire and operate inclined railways already constructed "together with the machinery and works connected therewith," and included in the sums to be paid on such purchase were the costs of the commissioners (plaintiffs). Then, by para. 12, the defendants are bound to proceed within six months "to take steps to acquire the rights and properties in the next preceding paragraph mentioned, *including the rights now claimed by occupancy or otherwise*," and to pay for the same, including the costs of the commissioners. The Whirlpool incline was the railway contemplated and referred to in these provisions, and it was duly purchased and taken over as a going concern. This was in or about

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the year 1891. Since 1885 at least (to the knowledge of a witness) the sale of souvenirs, etc., had been carried on at the Whirlpool incline; it had been and was, at the time of the purchase, one of the sources of revenue in the operation of that railway, and clearly authorised by the vendor company's charter. The defendants bought and paid for the business of the Incline as a going concern, "including the rights . . . claimed by occupancy or otherwise," and pursuant to their contractual obligation to the plaintiffs, and undoubtedly purchased and paid for the business of selling souvenirs, curios, etc. In all this, not only was there no notice or warning given by the plaintiffs to the defendants that the sale of souvenirs, etc., was objected to, or would not be allowed to continue, but, on the contrary, I think it is a fair and just inference to be drawn from the circumstances, that the defendants not only themselves expected, but were expected by the plaintiffs, to continue the business of selling souvenirs, etc., as a part of the going concern so acquired. It was well known to all concerned that the sale of souvenirs, etc., formed by no means an unimportant part in the business of all the inclined railways, and was evidently looked upon as an incidental factor in achieving success. That it is of material and financial importance is evidenced by the bringing of this action, after the lapse of more than forty years, by the plaintiffs, who, apparently, are seeking to acquire a monopoly in the business.

Under these circumstances, it would be grossly inequitable if the plaintiffs were to be assisted by the Court in stopping the defendants from carrying on the sale of souvenirs, etc., as an adjunct to the operation of the Whirlpool incline, which had been acquired as above narrated. In my opinion the plaintiffs are clearly estopped from making any objection.

That the doctrine of estoppel in pais operates even as against the Crown is well-established: *vide Attorney-General to the Prince of Wales v. Collom*, [1916] 2 K.B. 193; *Attorney-General for Trinidad and Tobago v. Bourne*, [1895] A.C. 83; *Plimmer v. Mayor etc. of Wellington*, 9 App. Cas. 699.

I am of opinion also that the defence of estoppel is well founded with respect to the Clifton incline as well.

The defendants had, under contract with the plaintiffs, acquired the Whirlpool incline, where a similar business was being carried on, and were now undertaking to construct and operate another inclined railway of a similar character. A station is to be built, of which the location and plans must be approved by the commissioners. The latter insist upon a more expensive



building than was contemplated by the defendants. Apparently the wishes of the plaintiffs were complied with, the inference to be drawn from the correspondence being that the defendants' right to sell "fancy goods" is not to be questioned.

In my opinion this correspondence was admissible to shew knowledge on the part of the commissioners, although probably not admissible on the question of the construction of the agreement.

It is manifest from the evidence that no such large or expensive station building as is shewn in exhibit 4 was required for the inclined railway: it is used almost entirely in carrying on the sale of souvenirs, etc.; apparently it is not fitted up as a waiting-room, being without even seats or benches. The waiting-room proper at the Clifton incline is on a lower level, and the premises on the ground level in exhibit 4 are used solely for the sale of souvenirs, etc., the passengers for the incline having to pass through to go down or upon coming up (*vide* evidence of Miller, pp. 39, 40). Having in mind the circumstances connected with the Whirlpool incline, its acquisition and the continuance there of a similar business, and the establishing at the Clifton location of another inclined railway, with building erected under the approval of the plaintiffs, to all appearances intended for use in the sale of souvenirs, etc., like the other, and this to the knowledge of the plaintiffs (as is shewn by the correspondence at the time), and such business being so carried on for over thirty years, I do not think the plaintiffs can now be heard to say that the defendants were without any legal right so to do. The agreement was silent on the point. All the other inclined railways in the district carried on similar business, and it was looked upon as a proper and usual adjunct to the main object of their operation. The case is quite unlike *North Eastern Railway Co. v. Lord Hastings*, [1900] A.C. 260, in which the agreement, in clear and definite language, provided for payment of a certain rental for every ton of coal carried. The stated rental was not collected during a long period of years. It was held that, as the words in the deed were plain and unambiguous, the fact that the parties had interpreted the words in a sense different from that which the words themselves plainly bore could not affect their construction.

I am therefore of opinion that the plaintiffs' action must fail upon the ground of estoppel also. Upon the defence of acquiescence, as distinguished from estoppel, I prefer to express no opinion.

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In my judgment, therefore, the plaintiffs' appeal should be dismissed and with costs.

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MULOCK, C.J.O., and MAGEE, J.A., agreed with GRANT, J.A.

HODGINS, J.A.:—I agree that this appeal should be dismissed, but prefer to put my judgment on somewhat more restricted grounds than those of the learned trial Judge and my brother Grant.

In point of fact the defendants do not carry on the business of selling souvenirs, etc., themselves. They lease out that privilege to Laughlin on a rental basis at the Whirlpool incline and to Millar at the Clifton incline, and there is a complete absence of any evidence to support the idea that it has ever been carried on by the railway company as part of its operations or that it is a necessary adjunct to the railway as such. The fact is that it is a lucrative business in itself at Niagara Falls, and, as the two lessees say, provides whatever profits come from their railway concessions.

Brundage, one of the incorporators in the original company, the Whirlpool Rapids and Park Company, carried on the fancy goods and souvenirs business himself from 1885 onward, till that company was bought out by the Niagara Falls Park and River Railway Company, and Miller says that no substantial change has taken place in the way it has since been handled. He himself, in 1895, leased from the Niagara Falls Park and River Railway Company the store and photograph business separately from the incline railway. Laughlin now runs both the railway and the other business under lease from the defendants. As to the Clifton incline, Miller leases the building and operates the railway and carries on the souvenir and fancy goods business separately from it and has done so for 22 years. He says that no part of the building he leases is used for or is of use to the railway. He pays 20 per cent. of the gross profits from both as rental to the defendants, but charges separately for the railway fare, the souvenir business as a business venture being his alone. He would not build and conduct an incline railway unless he had the privilege of carrying on the souvenir, etc., business in connection with it.

All this is very far from suggesting that the sale of souvenirs, etc., as a business is operated as a necessary adjunct to or accessory of the business or operation of a railway, or even of such a railway as an incline railway. Souvenirs are very attractive to Americans generally, and their liking is not confined to what is

found in Niagara Falls. There is no doubt that visitors to Niagara Falls from the earliest days have bought and still buy them generously, and that the right to sell them anywhere in the locality is valuable. But I do not see that they are in any sense incidental to the conduct of a railway.

Lord Dunedin in *Dundee Harbour Trustees v. Nicol*, [1915] A.C. 550, uses this language (pp. 560, 561):—

“The appellants do not dispute that” (the law as settled by *Ashbury Railway Carriage Co. v. Riche* (1875), L.R. 7 H.L. 653). “They concede that a statutory corporation must shew that its incorporating document authorises the acts it purposes to do; but they appeal to the dictum of the Lord Chancellor (Lord Selborne) in *Attorney-General v. Great Eastern Railway Co.* (1880), 5 App. Cas. 473, at p. 478, ‘that whatever may fairly be regarded as incidental to, or consequential upon,’ the things authorised are not to be held prohibited by implication. Applying that dictum to the facts of this case, they say the use of the steamers for excursion purposes is incidental to the main purpose of the ferry.

“My Lords, this can only be so if ‘incidental’ has such a wide interpretation as this—that any use of plant which brings in money, and so assists the main undertaking, is a use incidental to that undertaking. I cannot so hold.”

There seems to be no reason, however, why, subject to certain well known restrictions, the business such as that in question cannot be carried on in premises erected for the purposes of the company, or which were not in actual use in connection with the operation of the railway.

Lord Halsbury, in the leading case of *Foster v. London Chatham and Dover Railway Co.*, [1895] 1 Q.B. 711, lays down the proposition which I think can properly be applied to this case, in these words (pp. 716 and 718):—

“It is said that the use which the defendants make of this particular piece of land is one not authorised by the statute. Expressly authorised by the statute it is not. No minute or ancillary use of such part of a railway company’s property is ever expressly given by statute; but I think it might just as reasonably be contended that a railway company are not entitled to sell the hay which grows on their banks or cuttings so as to make something out of it. In fact, it would be possible to specify a great variety of uses which might be made of part of a company’s property which do not form a necessary portion of the business of carrying passengers or goods, and yet are uses not inconsistent

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"I for one entirely deny that there is any established proposition of law which prevents the railway company using this land and their arches for some collateral purpose that may give profit to them. A great variety of examples have been given by various judges of things which may be done by railway companies besides their own particular business. It is familiar to us all that coal stores and bookstalls, and a great variety of things, may be set up by railway companies which, although not actually used in the business of carrying passengers and goods, are nevertheless things which they may do, and yet carry on their own particular business quite consistently. I for one would be sorry to place any restriction on their power to make, to the best of their ability, their undertaking profitable to their shareholders and a convenience to the public."

It is made quite clear by the evidence in this case that the building in which this business is carried on is one whose dimensions and structure were approved by the former commissioners as part of the premises provided for the purposes of the railway company. It is a place which persons going to and coming from the incline railway must pass through, though it is not fitted up as a waiting room. Some place such as it must be provided to shelter passengers when waiting for trains and to make a landing place for entering or leaving the railway.

It is therefore part of the railway company's property, so far as their lease or licence provides for and contemplates its occupation, and I see no reason why the railway company have not the right to use it for any purpose not inconsistent with the operations of the railway, nor of such a nature as to prevent or hamper the carrying out of the purpose for which the railway company was incorporated, either physically or by conferring rights inconsistent with the proper operation of the railway.

I do not enter into any discussion of the amendment to the Joint Stock Companies Act (under the predecessor of which the original Whirlpool Rapids and Park Company was incorporated) whereby any corporation thereby dealt with was vested with the powers and capacities of a natural person.

In my view the considerations I have mentioned would cover both incline railways. But as to the Whirlpool incline there is another reason. In the agreement of the 4th December, 1891,



there is a clause, No. 12, dealing with the acquisition of the old Whirlpool incline:—

“12. The company shall and they do hereby undertake that they will with due diligence and within a reasonable time, and without any delay that is avoidable, and not later than six months from the date hereof, take steps to acquire the rights and properties in the next preceding paragraph mentioned, *including the rights now claimed by occupancy or otherwise*, and will pay the compensation money therefor so soon as the same has been ascertained, and the costs of the commissioners aforesaid, and on the acquisition thereof, the company shall hold the same under the commissioners free from any claim *against the commissioners by or in right of said proprietors or occupiers, which holdings under or attainments to the commissioners shall not make the company liable to pay any rents other than they have herein agreed to pay.* If the company shall not have acquired the said rights and properties within two years from the date hereof, the commissioners may acquire the same, and may use them to all intents and purposes as if this agreement had never been entered into, and free from any claim by the company to enjoy the same, or any benefits or rights connected therewith.”

There is no explanation given of what the company are to take over, referred to in the words which I have italicised.

As the company were to take over the Whirlpool incline under the general words of sec. 11, I can give no meaning to these expressions in sec. 12, unless they refer to what the original charter of the Whirlpool Rapids and Park Company contains, which gives power to that company to sell and deal in fancy goods and the photograph business and to carry on the work incidental to and connected with the said business and objects.

The onus is cast upon the plaintiffs, I think, under the circumstances detailed in the evidence, to explain to what matters the words I have quoted refer, and they do not attempt to do so. Obviously there were some rights claimed but not admitted which were to be acquired, and the cost of their acquisition was not to increase the rentals already fixed. In view of the ambiguity and the absence of surrounding facts to explain them as having any other meaning than the business of selling fancy goods, etc., I think this Court should not lightly disturb a condition in operation for so many years, and hold it to be outside the grant, lease, or licence granted to the defendants.

I have grave doubts as to the admissibility of some evidence introduced for the purpose of shewing knowledge in the then

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commissioners of the purpose of the defendants' predecessors in title in constructing the building in which the souvenir business is transacted, but it is not necessary to deal with that question in the view I have taken.

I would therefore, on these grounds, dismiss the appeal.

*Appeal dismissed.*

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*Contract—Action by Assignee to Enforce Forfeiture—Undertaking to Sell Shares of Company by Certain Day—Forfeiture if Undertaking not Fulfilled—Waiver—Election not to Forfeit—Consideration—Statute of Frauds—Uncertainty—Ambiguity—Exception.*

The judgment of ROSE, J., 62 O.L.R. 65, affirmed on appeal.

AN appeal by the plaintiff from the judgment of ROSE, J., 62 O.L.R. 65.

May 21, 22, 23, 25. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and GRANT, J.J.A.

*R. S. Robertson*, K.C., for the appellant. The writing sued on does not shew the real consideration. It was drawn up at the request of a third person and does not contain the full agreement. The Statute of Frauds does not apply because performance of the contract was contemplated by one of the parties within one year. Reference to *Reeve v. Jennings*, [1910] 2 K.B. 522, at p. 526; *Cherry v. Heming* (1849), 4 Ex. 631; Leake on Contracts, 7th ed., p. 175; *Quance v. Brown* (1926), 58 O.L.R. 578. The learned trial Judge erred in finding that the consideration did not appear. If the contract does not need to be in writing then the consideration need not be expressed. But in any event the consideration is set out in allowing the defendant to participate and to sell treasury shares. The agreement by Gordon to pool his shares was a consideration moving from him, and the trial Judge erred in holding that this was a consideration only for a similar consideration to pool shares on the part of Paxton. Gordon did

not need to pool his shares, but did so merely in order to assist Paxton in the financing. The trial Judge erred in holding that Paxton and Gordon were in the same position in this regard. The recital of the general situation between the parties is a sufficient recital of consideration. The document can be looked at as a trust agreement by Paxton, so that forfeiture would operate on certain conditions. Reference to *Gandy v. Gandy* (1885), 30 Ch. D. 57; *Touche v. Metropolitan Railway Warehousing Co.* (1871), L.R. 6 Ch. 671. The trial Judge erred in holding that the transaction with Josephs and Weisman was an election on the part of Gordon not to enforce the right of forfeiture. The transaction had no relation to the forfeiture. There was nothing requiring that Paxton should or should not have forfeited his shares. The transaction concerned treasury shares which Paxton was selling on commission. In any event the onus is not on the appellant to shew that the negotiation was not a waiver. The onus is on the defendants to shew that it was.

*A. G. Slaght*, K.C., and *J. Bicknell*, for the defendants, respondents, contended that, as this action is penal in character, the appellant must shew in strictest terms his rights. The agreement sued on set out accurately the terms of the agreement between the parties. There was no arrangement or understanding prior thereto which should be read into the agreement in order to interpret it. It was drawn at the instigation of a third party and for his purposes only. There was no consideration passing between Gordon and Paxton at that time. The agreement was one which must be in writing, as it was an agreement that Gordon would pool his shares until the 1st January, 1928. It was a continuing covenant for more than one year and therefore comes within the Statute of Frauds and all the terms must be set out. As no trustee was appointed, it was simply a covenant between the parties, a contract uncertain as to the amounts to be paid, which cannot be interpreted. Therefore the time when forfeiture occurs cannot be determined. The real consideration was one passing from an unnamed party. Unless consideration passes between the parties to the agreement, it cannot be enforced against them. It becomes simply a voluntary agreement. In any event, having encouraged the Josephs and Weisman deal and thereby extended the time for forfeiture, the appellant could not, after that deal fell through, date back the forfeiture to the original date and say that it was effective without further notice. The appellant must give notice from the extended time, and the trial Judge was right in so holding.

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September 24. The judgment of the Court was read by HODGINS, J.A.:—Appeal from Rose, J., who dismissed the action brought to declare a forfeiture of certain mining shares, etc.

The facts of this case are so fully and clearly set out in the reasons for judgment in the Court below that I need not detail them here.

The contest really revolves around the contents of an undated document said to have been executed on the 21st September, 1925 (exhibit 5), signed by Paxton, John B. Terry, and Gordon, three parties who had among them certain mining claims, and were engaged in the “purchase, flotation, and incorporation” thereof into a company known as “McCarthy-Webb-Goudreau Mines Ltd.” Each party had previously acquired and had vested in him one-third of a total of 1,250,000 shares which the vendors of the claims had given back to them out of the purchase-price, except that those of Paxton, the defendant, stood at his request in his wife’s name. By this agreement it was stipulated that each of these parties “pool” 250,000 shares until the 1st January, 1928.

The operative part of the document is as follows:—

“Now it is agreed between Norman Paxton and John B. Terry of the first part and Melville B. R. Gordon of the second part that should the parties of the first part fail in their efforts to produce the above sums from the sale of capital stock or otherwise in the time-limits aforesaid the parties of the first part thereby forfeit their right and title in the division of the said stock and turn back to the said Melville B. R. Gordon party of the second part all stock so allotted but retaining therefrom a number of shares as per ratio of the capital sold and proceeds turned over to the company. It is further agreed that should the board of directors not require moneys in the sums above set forth the time-limit of this agreement is automatically extended.”

The time-limits and the sums referred to in the above are contained in a recital which runs thus:—

“Whereas the said Norman Paxton and John B. Terry have verbally agreed with the said Melville B. R. Gordon to undertake the sale of treasury stock in the amounts to net the company \$100,000 by 1st of January, 1927, \$100,000 by 1st of January, 1928, and further amounts until sufficient stock has been disposed of to equal per ratio share for share of the 250,000 shares of capital stock allotted to each and held with the said Melville B. R. Gordon.”

It will be observed that the agreement is between Paxton and John B. Terry as promisors and Gordon as promisee, all three



being owners of an equal number of shares in this company and all having an equal share (under an agreement of the 10th August, 1925) in the agreement of the 5th August, 1925, made between the vendors of the claims and Paxton as purchaser, by which these claims had been acquired for the company. All were therefore equally interested in the company's property and in the performance of the obligations in the purchase-agreement to be performed in order to retain the claims and liable for one-third share of the obligations assumed by Paxton. No consideration is named therein nor did any pass between the three parties unless the agreement to pool 250,000 shares can be so considered. I do not so regard it. The pooled stock was not treasury stock but stock individually owned and had no bearing upon the arrangement by way of benefit to Paxton and J. B. Terry passing from or to the detriment of Gordon. This is evident from the fact that on the 4th December, 1925, the 750,000 shares were pooled (see exhibit 10) only till the 12th November, 1926, and that on that date the trust company, with whom the 750,000 shares were deposited pursuant to the agreement to pool 250,000 shares each, notwithstanding the agreement (exhibit 5), had named the 1st January 1928, as the time-limit, returned the certificates to the three parties who had deposited them. This was in pursuance of the letter of deposit which bears date the 4th December, 1925, by which all parties agreed that the 750,000 shares should remain in the pool until the 12th November 1926, a date falling before the first time-limit within which Paxton had to perform his agreement. The forfeiture could not operate until Paxton had made default as to the sums mentioned at the periods to which time-limits were set, these being the 1st January, 1927, and the 1st January, 1928.

The document (exhibit 5) had its origin in this way: Of the purchase-money for the property \$2,500 had to be paid by the 21st September, 1925, and there was no money to pay it. What transpired is thus stated by the learned trial Judge (62 O.L.R. at p. 68):—

"J. B. Terry appealed to his brother, S. D. Terry, for assistance. When S. D. Terry had discussed the matter he expressed himself as being unwilling to try to interest any of his friends unless the loose understanding that Paxton, J. B. Terry and Gordon had among themselves relative to the financing of the proposed company and the use to be made of the 1,250,000 shares was made more definite and an assurance was given that the required capital would be procured, and that in the meantime as many as possible of the shares coming to Paxton, J. B. Terry and

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Gordon from the vendors should be kept off the market. The three co-adventurers had to have the \$2,500 if they were to keep their rights under the option alive, and, S. D. Terry having prepared a memorandum of agreement, they signed it, and S. D. Terry signed as a witness to their signatures. This is the document upon which the plaintiff bases his claim."

The plaintiff claims, under Gordon, by an assignment to him, as representing the company, dated the 11th March, 1927, and by a further assignment from S. D. Terry, dated the 14th April, 1927. The former reads:—

"For value received, I hereby assign and set over unto R. A. Hutchison, of the town of Whitby, in the county of Ontario, all my right, title, and interest in an agreement entered into between myself, Norman Paxton, and J. B. Terry, covering seven hundred and fifty thousand (750,000) shares of vendor's stock of the McCarthy-Webb-Goudreau Mines Limited, and all benefits and advantages to be derived therefrom and from the stock mentioned therein."

The latter:—

"Know all men by these presents that I, Stuart D. Terry . . . , for good and valuable consideration to me paid by R. A. Hutchison . . . (the receipt whereof is hereby acknowledged), do hereby assign and transfer to the said R. A. Hutchison and his assigns all my interest in a certain agreement dated the 26th day of March, 1926, between Norman Paxton and Lillian M. Paxton, of the first part, John B. Terry, of the second part, and Stuart D. Terry, of the third part, regarding certain shares of stock in McCarthy-Webb-Goudreau Mines Limited, and every covenant, article, or thing therein contained.

"To have and to hold the same to the said R. A. Hutchison, with power to take all lawful measures which I might myself have taken for the full recovery and enjoyment of all rights and provisions mentioned in the said instrument."

As to both these assignments questions are raised. As to that from Gordon I agree with the learned trial Judge that the benefit of anything enforceable under the contract is assignable and that the plaintiff must stand or fall by the result of this judgment as to Gordon's rights. As to the latter, S. D. Terry had nothing to assign. As to him, the consideration for his advance of money was the entering into the document (exhibit 5) by the three parties thereto; and, as that was done, nothing remained which he could transfer to another.

Many objections—thirteen in all, I think—were made to the plaintiff's recovery in this action. I think those dealt with by the learned trial Judge are the most formidable.

First as to the consideration: It is quite clear to me that S. D. Terry brought about the so-called agreement (exhibit 5) for his own benefit and satisfaction before he would advance his \$2,500, and that the parties agreed to it in the form it took to please him, and that each of the parties to it is quite at liberty to resist its enforcement by the other or others, as from none of them did any consideration proceed. S. D. Terry says at p. 168 of the transcript of evidence:—

“The agreement, as I understood it at that time, among them was only verbal, and I suggested that we put something in writing, that there would be some assurance to the people that were joining me that the financing would be carried on. . . . Gordon had secured the option; Paxton and J. B. Terry were brought in to finance the company, for which they were to receive a block of stock. Gordon was not entering into the financing deal whatsoever; he was getting his block of stock, as I understood it, for the securing of the option; they were getting their block of stock for the financing of the company. And they had agreed among themselves to do certain things, but nothing in writing had been made. . . . I told them that unless they gave some definite understanding of *what they would do*, and that there would be some hold on the stock that they were getting or a portion of it, to *finance the company*, I could not ask capital to join me to assist them where they would draw down stock without completing what they had undertaken to do.” Then he is asked:—

“Q. And as the result, then, of the conferences you had and the preparation and signing of this document, what did you do?  
A. I secured the money to make their first payment for them.”

S. D. Terry, however, also got from Paxton 55,000 shares which he says were given to him “to bring somebody in to make the first payment that they were unable to do”—that is the first payment of \$2,500. He was also to become and did become secretary-treasurer at a salary. From this it is not difficult to conclude that the real consideration which passed to S. D. Terry, in addition to the formulating of the relations he wished the others to occupy, was the block of 35,000 shares which he received for bringing his associates in with the \$2,500, and that the signing of exhibit 5 was done so that it could be used to shew what the parties to it contemplated as their programme for financial success. It clearly was not intended to be comprehensive as between

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the signers of it. This hardly needs demonstration, but the fact that Gordon, S. D. Terry, and Paxton, at all events, were selling and kept on endeavouring to sell treasury stock on a 25 per cent. commission basis all along, and were, individually, making or trying to negotiate contracts sufficient to absorb all the stock that was in the treasury, is sufficient to shew that exhibit 5 was never treated as conferring any actual rights on or creating any real obligation as between the parties to it that would enable any of them either to interfere with Paxton in his stock-selling projects or enable them to claim his stock if he failed. This will appear when the proceedings of 1926 are discussed. It served its purpose apparently with S. D. Terry and his associates, and that was all it was intended for, as the conduct of the affairs of the company amply demonstrates.

In *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge and Co. Ltd.*, [1915] A.C. 847 (H. of L.), the contract between Dew and Selfridge was made at the instance of the Dunlop company, and provided that Dew should not sell at a lower price than the list price and should exact a similar agreement from his purchasers. The consideration which was put forward on behalf of the Dunlops was stated thus (pp. 851, 852):—

“These price maintenance agreements deal with proprietary articles, and A. J. Dew & Co., as the respondents well knew, were under contract to the appellants not to supply these articles to trade customers on trade terms except on condition of exacting from those customers an undertaking to observe the appellants’ list prices.

“The consideration moving from the appellants to the respondents is that the appellants, with the knowledge of the respondents, permit A. J. Dew & Co. to sell tyres to the respondents on favourable terms and that the respondents take advantage of those terms. But for the intervention of the appellants the respondents could not have got the goods on those terms at all.”

This means, as I take it, that Dunlops supplied tyres to Dew at their own price but also for a consideration which consisted in securing from Dew & Co., for the benefit of Dunlops, an agreement that they would obtain from sub-purchasers a contract which would prevent the sub-purchasers of these tyres from selling or allowing them to be sold for anything but a price satisfactory to Dunlops, thus maintaining their market.

Lord Sumner in his speech says (pp. 861, 862):—

“Let it be assumed also that evidence was admissible to add an unexpressed consideration moving from the appellants to the



expressed consideration moving from Messrs. Dew & Co. Let it be assumed further (though this is a large assumption) that the terms of the instrument do not so designate Messrs. Dew & Co. as the principals and the only contracting parties as to shut out proof that the appellants were their undisclosed principals. After all, what consideration moved from the appellants? . . . I think that Messrs. Dew & Co. exactly performed the conditions of their agreement with the appellants. The firm of Selfridge & Co. was the 'trader' within that agreement, and Messrs. Dew & Co. duly obtained that firm's written undertaking to the intent therein described. The undertaking was in the appellants' own form, and Messrs. Dew & Co. did not contract even by implication that the undertaking which they would obtain should be binding.

"The respondents signed what they were asked to sign, but nothing precluded them from saying afterwards that it was *nudum pactum*."

I think this fairly describes the situation here, for S. D. Terry did not secure any promise from any of the three parties to exhibit 5 that the forfeiture of the shares would enure to his benefit, but was content with the agreement of those parties that on Paxton's failure the other parties would reap the benefit provided for. The parties to exhibit 5 performed S. D. Terry's condition by making their agreement in the form he prescribed, but he never acquired any right to enforce its terms.

I have read all the minutes and correspondence put in, especially that relating to the doings of 1925, 1926, and 1927. They disclose dealings quite inconsistent with any forfeiture under exhibit 5 such as is now set up. Paxton was appointed fiscal agent of the company by resolution of the board on the 21st November, 1925, the company having been incorporated on the 26th October, 1925. Gordon says (p. 97) that this was "the only way he had power or right to sell any shares." And this position Paxton did not relinquish until the 31st December, 1927, and then at the request of Gordon.

On the 21st November, 1925, the board put 50,000 shares of treasury stock at the disposal of the fiscal agent on a commission of 25 cents a share. From that time on Paxton went to work in the United States of America, and, finding no market for shares, commenced to try and float underwriting schemes there, corresponding with the company throughout. There were various objections to his proposals by the board, and they were all unsuccessful, some because they involved control to which the board would not agree.

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Some payments to Goudreau and Webb were meanwhile financed by S. D. Terry and his associates, they getting additional shares from Paxton and J. B. Terry as consideration for their payments. One offer, in particular, which Paxton submitted, to net \$275,000 in two years or to accept 50 cents per share for 1,000,000 shares, was turned down by the board in January, 1926, on the question of control and price.

As early as the 27th January, 1926, S. D. Terry writes to Paxton:—

“As fiscal agent of the company it is up to you to produce these funds (for diamond drilling) or let us close shop.”

To this Paxton replies, offering to resign as fiscal agent and submitting that the directors are making a mistake in not accepting the underwriting deal and asking a definite price for 1,000,000 shares of treasury stock to net \$400,000 and their terms on an underwriting deal, which he asserts is the only way of raising money. To this the reply was that McCarthy and Webb wanted \$1 per share and S. D. Terry would not sell at Paxton's figure, and that therefore there was not sufficient stock in the treasury to meet his requirements, but that if he could put through a deal of the kind he suggests, on suitable terms, it would be acceptable to the board. This is in effect a suggestion that Paxton and others make up the amount of stock necessary out of their vendor's shares. Later, in February, S. D. Terry says 37½ cents per share would be accepted for treasury stock alone. This Paxton found he could not obtain, though he tried to arrange an underwriting at 50 cents, but it fell through on the question of control on the 10th March, 1926.

Through all these negotiations, in which Gordon as president was involved, there is no hint that exhibit 5 was the basis on which the proceedings were going forward. But on the 11th March, 1926, S. D. Terry writes:—

“While we can understand that you have met with serious difficulties in trying to finance this situation and have not met with success, we believe that your efforts have been placed primarily in the wrong channel, and that, first and foremost, in your agreement and Jack Terry's with Mr. Gordon, it was imperative on your part to see that the necessary funds were forthcoming to meet our small pay-roll up to the time of the diamond drill starting.”

This, it will be noted, is from S. D. Terry, but nowhere is there any indication that Gordon or J. B. Terry was insisting on exhibit 5 or invoking its terms. In fact, Gordon's letter to Paxton the next day, the 12th March, 1926, does not mention it, but says:—

"Replying to your wire of yesterday, we are all here terribly disappointed that your deal with Philadelphia has fallen through. Of course we know that you are just as disappointed as we, but we figured when they asked for the different options and agreements on stated terms, that the engineer would visit the property on these terms, and not on any new terms to be set forth."

The directors themselves tried to put through a deal with the Pikes, to whom Paxton refers on the 27th April, 1926, in a letter from Buffalo: "Pike and Co. are a bunch of sharpshooters." This proposition also fell through. It was not till September, 1926, that the board, through S. D. Terry, notified Paxton that they were prepared to sell 700,000 treasury shares at from 20 cents to 60 cents net to the company. In November, 1926, the Joseph and Weisman deal was initiated by Paxton, and Gordon writes him as follows on the 23rd November:—

"With the stock that I hold under the agreement, it is quite in order that we can make a control deal, *but this would necessarily have to be after the 1st day of January, 1927.* In the meantime, you can negotiate and arrive at a definite agreement from both sides. McCarthy refuses to sell any of his stock, he intends to hold all of it until such time as the property has been developed to shew its value. I did everything in my power to induce him to release even a part of it, but he refused. Control, therefore, must be given up amongst us, the original promoters of the property."

Then in a following letter Gordon says:—

"I would advise your bringing Mr. Josephs here and discussing the situation. McCarthy et al. state that they will not agree to any deal unless . . . fifty cents a share for treasury stock on a basis of seven hundred thousand shares, the stock to be taken down by the operating company or syndicate at regular periods, as money is expended. McCarthy specifically stated that all the promoters' stock must be used to give control, and not theirs.

"Among us, therefore, we must arrive at a reasonable price, which will be satisfactory to the purchasing company and to ourselves, which will give them what they desire. An agreement safeguarding the company and the original promoters must, therefore, be entered into which will be satisfactory to all.

"I believe this can be worked out, but advise immediate action as other deals are pending. I cannot too strongly advise you and your associate to take advantage of this present condition which will allow them to option the promoters' stock at an absurdly low

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figure, in regard to the value of the property as shewn by the work already done, payments made, and general conditions.

"Let us hear from you as soon as you have anything definite to offer."

In the same month Gordon, in cross-examination, makes the following answer:—

"Q. Then when you say you wrote him in December for his resignation, and that you wanted to pave the way for the company—when you say you wrote him in December to send a resignation and pave the way for Ruthven taking up capital, there was no indication to him then that you were going to sue him or require forfeiture of his shares; that was a friendly communication, wasn't it? A. Oh, yes.

"Q. And he sent you back his resignation with a friendly communication? A. Quite so.

"Q. When he did that you regarded the matter as off so far as he going on with his contract? A. Yes."

These letters indicate not an impending forfeiture but a new agreement on the basis that all three promoters would come to some arrangement to allow their stock to be used to give the purchasers the control.

After this, an agreement with Weisman was prepared (exhibit 17), dated in November, 1926, and to which the company, McCarthy and Webb, as well as S. D. Terry, Gordon, and Paxton, were parties. It is significant that by it Terry, Gordon, and Paxton agree to deposit, five days after Weisman accepts the option, 750,000 shares of the capital stock of the company with a bank or trust company to remain there for two years and a half (and so withdrawn from sale, mortgage, etc.), unless Weisman consents or falls down on the performance of his contract. It is to this proposition, which fell through, that reference is made in the reasons for judgment, thus (62 O.L.R. at p. 72):—

"On the 4th January, 1927, Paxton wrote to Gordon saying, amongst other things, 'Josephs et al. . . . have an idea that directors of McCarthy-Webb are stalling and looking for a better deal elsewhere. They will not offer any better terms on McC.-W. than submitted, and I am afraid that unless they get a definite answer at once they will call the deal off and forget the whole camp;' and on the same day (but of course not in answer to Paxton's letter) Gordon telegraphed to Paxton saying, 'Deal still pending.' What else Gordon said in his telegram does not appear—the telegram has been lost, and the only evidence of its contents is Gordon's admission of the correctness of a quotation in a letter



written by Paxton on the 5th January—but apparently there was not in the telegram any statement of the directors' reason for delaying to accept or reject the offer. Gordon, however, admits that it is quite clear that after the 1st January, 1927, he was negotiating with Paxton; and it seems to be clear that after the negotiations with Weisman and Josephs fell through there was no statement by any one to Paxton that if he did not within a certain time procure the first \$100,000 he would be treated as in default and the forfeiture of the 250,000 shares would be insisted upon; possibly it was assumed that Paxton, who on the 31st December had resigned from the directorate, giving as a reason that he was too busy in New York to attend properly to the company's affairs, had abandoned his interest. On the 10th March, 1927, the company entered into a contract with F. G. Oke & Co., which put it out of Paxton's power to sell shares of the treasury stock."

The following letter was written by Gordon to Paxton on the 5th January, 1927:—

"Maguire was in from the Soo representing McCarthy. He is absolutely against the (Weisman) deal and so are Hutchison and Terry, on account of the fact that the debts of the company are not being paid under the agreement, and, providing that you took up all the stock, there would be no source from which these could be met. It is essential that, as part of the agreement, these should be taken care of. I might be able to do something if you can arrange this, otherwise I fear it is impossible."

I cannot see, considering the way in which Gordon and S. D. Terry, president and secretary-treasurer, respectively, of the company, were acting with Paxton during 1926, and particularly in view of the last three letters and the terms of the Weisman agreement which I have quoted, how any pretension can be set up that exhibit 5 was being held over Paxton's head or that any party thought it was the authority or agreement under which he was working. If forfeiture was in the minds of Gordon et al., they certainly kept it entirely in the background, and the letter of the 23rd November contemplates not forfeiture but an agreement after the 1st January, 1927, in which of course Paxton's assent was required. This is totally inconsistent with forfeiture or intent to forfeit. The explanation seems pretty obvious when Gordon's evidence is examined. Paxton, having resigned his directorship at the request of the board on the 31st December, 1926, and his share certificates being in the possession of Gordon, who had, without his knowledge, obtained them from the trust company in November, 1926, it was determined to hold on to them so as to enable

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on the 10th March, 1927.

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Gordon's evidence as to the Oke contract is illuminating:—

"Q. When did you tell Paxton that you were going to make the Oke contract? A. I don't recollect.

"Q. Well, about when? A. I am not sure that it was not until after it was made, but I would not be positive about that.

"Q. And why should that be? Why did you leave him under his (*sic*) until after the Oke was made? A. Well, as I say, we figured that he was not in the picture at all at that time. He had resigned as fiscal agent, and as director, and we were doing our best to finance the company."

I agree with the learned Judge's conclusion (62 O.L.R. at p. 73) that "Gordon precluded himself, by his dealings with Paxton after the 1st January, 1927, from asserting the right to forfeit Paxton's shares," and I think that even before the 1st January, 1927, the course taken by Gordon negatives any such right.

I have already said that in my opinion the forfeiture was contingent on failure to supply both sums of \$100,000 on the stipulated date, and that opinion is founded not only on the plain wording of the agreement but on the view that words of forfeiture should be strictly construed, particularly when the course of the person asserting the forfeiture has been disingenuous. I have no doubt as well that if it was intended to enforce the forfeiture on default being made on the 1st January, 1927, notwithstanding what occurred, and if that course was permissible, Gordon, after that date, was bound to have notified Paxton of his intention and named a reasonable time thereafter when, if the money was not forthcoming, he would claim the shares.

There are other objections urged before us outside those which I have been considering. I do not think that of uncertainty can prevail. The forfeiture provided for is clearly of the plaintiff's 250,000 shares; but, if there is ambiguity in the exception, the principle laid down by Mr. Justice Burton in *Muttlebury v. King* (1879), 44 U.C.R. 355, affirmed by the Court of Queen's Bench in term, is applicable: "If there was anything faulty in the exception, the whole of the property mentioned in the first part of the description would pass" (p. 358).

The other parts are hard to understand, though both parties must have had a common idea which is badly expressed, but I think the meaning is this: The number of shares to be deducted

from the 250,000 is the number of treasury shares sold by Paxton, the proceeds of which the company received.

I do not desire or think it necessary to go over all the other grounds of objection, as I think on the merits the appellant fails and the appeal should be dismissed with costs.

*Appeal dismissed.*

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[APPELLATE DIVISION.]

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*Trial—Action for Assault, Malicious Prosecution, and Malicious Arrest—Dispensing with Jury—Discretion of Trial Judge—Findings of Fact—Appeal—Alleged Illegality of Warrant for Arrest—Point not Raised at Trial—Public Authorities Protection Act, secs. 11-15—Judicature Act, secs. 54, 56, 57, 63—Rule 398.*

In an action against a police officer for assault and battery, malicious prosecution, and malicious arrest, the trial Judge dispensed with the jury in the trial of the claim for assault and battery. He also ruled that in the trial of the claim for malicious prosecution it was his duty, under sec. 62 of the Judicature Act, R.S.O. 1914, ch. 56 (then in force) to decide all questions both of law and fact as to the existence of reasonable and probable cause; and he said that the jury would be called upon to try only the issues as to malice and damages. A jury was then called and sworn and the trial proceeded. The evidence being closed and the jury having retired, the trial Judge gave judgment dismissing the claim for assault and finding that there was reasonable and probable cause for the prosecution. He also held, on the facts, as a matter of law, that there was no foundation for the claim for malicious arrest. He, therefore, dismissed the whole action and discharged the jury:—

*Held*, upon appeal, that the trial Judge's findings were warranted by the evidence.

2. That the arrest complained of was made under a warrant issued as a result of the laying of the charge on which the plaintiff based his claim for malicious prosecution; and that the point raised upon appeal that the warrant was not sealed, not having been raised at the trial, was not open to the plaintiff, all the evidence necessary to adjudicate upon it not being before the Court: secs. 11 to 15 of the Public Authorities Protection Act, R.S.O. 1927, ch. 120.
3. That, having regard to the Judicature Act, R.S.O. 1927, ch. 88, secs. 54, 56, 57, and 63 (the latter being the same as sec. 62 of the earlier Act) and to Rule 398, the trial Judge had a discretion to dispense with the jury and that his discretion was properly exercised.

MAGEE, J.A., dissented.

AN action by a leather-worker against a police constable for assault and battery, malicious prosecution, and malicious arrest.

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October 20, 1927. The action came on for trial before RIDDELL, J.A., at a Toronto jury sittings of the Supreme Court of Ontario.

When the case was called, RIDDELL, J.A., said that the claim for trespass would be tried without a jury. As to the claim for malicious prosecution, the duty of deciding upon both the facts and law as to the existence of reasonable and probable cause is cast upon the trial Judge. Therefore the jury would be called upon to try the issues as to malice and damages only.

A jury was then called, the jurors were sworn, and the trial proceeded.

*J. C. McRuer*, for the plaintiff.

*J. D. Lucas*, for the defendant.

The evidence being closed, the jury retired, and, after hearing counsel for the plaintiff, RIDDELL, J.A., gave judgment as follows:—

I shall not need to call upon the counsel for the defendant in this case. The duty having been cast upon me by the Judicature Act, R.S.O. 1914, ch. 56, sec. 62, in a case of malicious prosecution, to decide all questions both of law and of fact necessary for determining whether or not there was reasonable and probable cause for the prosecution, in the exercise of that power I am deprived of the advantage of the assistance of the jury in determining those facts: at the very least, I may try this point without a jury, and I do so. In determining the facts upon which the question of the liability of the defendant for the alleged assault and battery must depend, I can deal with them in both causes of action together. I am quite aware of the responsibility which I take upon myself when I decide without the assistance of the jury questions which might, under the law, be determined by a jury; and I am not assisted in that regard, and in the exercise of that choice, by the decisions of the appellate courts, because the appellate court of which I have the honour to be a member has decided, in more than one case—and I must consider that to be the law—that an appellate court has no jurisdiction to entertain an appeal from the decision of the trial Judge to try the case himself without a jury. Therefore, it is not without full and careful consideration that I decide that I should try this case in respect of the assault and battery alleged, and so far as anything on the record can be tried without a jury, without the assistance of the jury.

That being so, I attack the facts. The findings of fact must depend upon the relative credit to be given the various witnesses



who were called. In determining that relative credit, or indeed the credit to be given to any witness, one must be largely influenced by the conduct and demeanour of such witness in the witness-box. Consequently, as was my duty, I paid careful attention to the conduct and demeanour of all the witnesses who have been called; I formed my estimate of their relative credibility with the assistance of such observation, and I have no hesitation in finding the following facts:—

Owens and Smith having been drinking to what may be characterised as, at least, a considerable extent, Owens having had, as he admitted, four and perhaps five glasses of beer, and then having put whisky on top of it—Smith having also taken a certain amount of liquor—the two of them were invited by Mrs. Jones into her house, somewhere after 2 o'clock, one Sunday morning. I am making no suggestion against the respectability of Mrs. Jones, or against the respectability of her house; but it is at least odd that gentlemen who had been drinking, as they had been, should be invited into a lady's house at that hour in the morning—Sunday morning even though it was. Of the propriety of that, however, it is for her to be the judge not me; I lay no stress upon it.

Mrs. Jones was preparing to retire; at one stage of things, she states that she had removed her outer garments and was dressed in her kimono, and was standing at the curtain which divided her apartment from the room in which Smith and Owens were. Owens had drunk so much that he fell asleep; I find as a fact that he was seriously under the influence of liquor, and that had very much to do with his falling asleep as he did, with his head on his arms upon the table. Smith was playing with the children, two little tots it is said; precisely why they were up till two or three o'clock on Sunday morning does not appear, nor need it be considered. They were "hollering," as Smith himself says, whereupon one of the neighbours, hearing the "ruction," no doubt, communicated with the defendant, who was a police officer, and told him that there was trouble in the vicinity—I do not pretend to give the exact words—whereupon he clothed himself, took with him his policeman's badge in his pocket, and went out in the street in order to do his duty as an officer of the peace. It is too often forgotten that the peace officer is an officer whose duty it is to see to it, so far as he can, that the peace is observed. He came across a man whom he knew, and asked him to go with him, wisely, as I think; a policeman might find himself in very serious difficulty, being alone, going into or to a place where "there was trouble going on"—to use the language employed by so many of the witnesses.

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In this house, he heard something like a gurgling yell, which has been described by Smith as "hollering." Believing, and with probable cause believing, that there was a breach of the peace going on in the house, he entered the house, saw the two men, told them that he had come in on account of the trouble there, told them that he was a police officer, and shewed them his badge. He saw Mrs. Jones and spoke to her as the proprietress of the house. He seems to have known her before. He asked her about it, and she told him, according to the story, that she had asked Owens and Smith to go once or twice; then the peace officer said, in effect, "Do you want them to go now?" And Mrs. Jones said, "Yes, put them out." In pursuance of what he conceived to be his duty, and what was in any case his right as the civil agent of Mrs. Jones, who wanted the men put out, and had asked him to put them out, he told Smith to leave; whereupon Smith seems to have left.

Owens was in a drunken slumber at the table; and the officer did what any reasonable and sensible man would do under the circumstances, shook him to waken him, and told him to get out. When going out, Owens struck the officer and knocked him down. The officer says—and I believe him—that Smith and Owens proceeded to kick and beat him; he was rendered unconscious for a time; he came to himself and heard one of them say to the other, "Let us kill the—" (using a vile word I need not repeat). He thought, and reasonably so, that his life was in danger, whereupon he fired his revolver into the air, as he thought, believed and intended. In the witness-box, he held his hand in the position in which he said he held the revolver; and that was, as I saw, indicating that the muzzle of the revolver was not straight up but was apparently rather towards the earth.

I find, as a fact, that he had no intention or desire to shoot either of these men. One bullet seems to have gone through the coat sleeve of the coat which Smith was wearing, and which was put in as an exhibit. It is possible that a third—I mean a second—bullet found its billet in the body of Owens, although that is not Owens's story.

Owens told a story which to me is simply incredible, and I do not believe it. He says he heard two shots, then he went away down one street, and west on another, followed by some one—he will not swear that it was the defendant—consequently, even on his own evidence, an assault by the defendant is not proved. He says he was followed by some one with a red face, who shot him, whereupon he, at once, or very shortly afterwards, made his way

into the house of one Mulholland, who was called here as a witness.

I find as a fact that when Owens was lying in this house, he was asked by another peace officer in the pursuance of his duty—because it is his duty to investigate facts connected with such a breach of the peace as had undoubtedly occurred—when this officer, Mr. Creighton, whom I believe, said to Owens, “What were you doing that he had to shoot you ?” Owens said, “I had him down, kicking his head off.”

It is true that some who were in the vicinity did not hear this statement, or if they heard it have forgotten it, or, if they heard it and have not forgotten it, have stated what was not true in the witness-box. I believe Creighton, and I find the fact to be as he deposed.

I find as a fact that that conversation did take place; that Owens knew perfectly well, at that time, why the revolver had been shot off; that at that time he correctly stated why the revolver had been shot off; and that the defendant had neither the intention nor the desire to injure any one; he was protecting himself from imminent peril of his life and limb.

It may perhaps be noted that witnesses were quite frequently asked by learned counsel what the defendant had said immediately after the event, and the defendant's account if it within a very short time after the occurrence corresponds exactly with what he said in the witness-box.

I believe the evidence I have spoken of as believing, and I disbelieve the evidence which contradicts it. I am charitable enough to believe that some of these witnesses told what they thought they heard; but, whether they did or not, their evidence is not to be taken against the evidence which I have expressly credited.

That disposes of the assault, and that part of the action will be dismissed; and, unless something occurs later on to change my mind, with costs.

Now I come to the question of reasonable and probable cause for the malicious prosecution. Having found those facts, I proceed further—the police officer did, as was his duty, report the circumstances; he went to see or was sent to see, it does not appear which, a responsible officer of the Crown in this city, and stated to him all the facts of which he was aware; he made a full and accurate disclosure of the facts, so far as known to him; he stated that which was true. An information was then laid, on the advice of this counsel after such full disclosure of the facts; and that in itself, according to decisions that are binding upon me, is sufficient as regards reasonable and probable cause.

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If that learned counsel made a mistake as to what form the information should take, that is something for which the defendant, as such, is not responsible; he is following the direction of the responsible officer of the Crown, after a full disclosure of the facts. That of itself is reasonable and probable cause.

But, independently of that, there was ample cause for laying the prosecution. That disposes of that branch of the case; therefore, the action with respect to malicious prosecution will be also dismissed.

Now we come to the malicious arrest. The information was laid on the 15th November, the warrant was issued on the 15th November, the warrant being directed to the peace officers in the city of Toronto and county of York, and, being acted upon by the defendant, the arrest took place on the 20th November; it was part of the malicious prosecution, if any, and no part of the malicious arrest.

Therefore, I hold on these facts, as a matter of law, that there is no foundation for the charge with regard to the malicious arrest, and the whole action will be dismissed.

As there has been much contradiction in the evidence, I think I should state specifically that credit is to be given to the defendant and Creighton without qualification, and not to the plaintiff and those called by him.

A discussion between the trial Judge and counsel followed:—

*McRuer*: I submit that it should go to the jury as to whether taking the plaintiff by the arm and taking him to the street might constitute arrest, and whether it was done maliciously.

RIDDELL, J.A.: I shall not leave that to the jury, on the facts as they are disclosed.

*McRuer*: I reserve my rights as to that.

*Lucas*: May I speak of what I think was an inadvertence? Your lordship spoke about the constable being knocked down, and about one bullet having passed through the sleeve of Smith's coat, and you said, "perhaps the third bullet."

RIDDELL, J.A.: I ought to have said the "second bullet" only—there was in fact no third bullet. Nobody says anything about a third shot, except the plaintiff.

*McRuer*: Your lordship is leaving the questions of malice and damages to the jury?

RIDDELL, J.A.: Not after my decision, it would be useless.

*McRuer*: I ask your lordship to leave that to the jury, because I may have occasion to quarrel with your lordship's finding.



RIDDELL, J.A.: If there be a new trial, that will be for the trial Judge to decide.

*McRuer*: My lord, I do feel that one of the great principles in the administration of justice, which your lordship upholds with such dignity, is that those who come before the Court shall feel that they have had an absolutely fair trial. I would ask that we have the opportunity of having the jury pass upon the questions of malice and damages, so we will not be put to the expense of coming back for a new trial, should the higher Court feel that your lordship has gone wrong.

RIDDELL, J.A.: I think not, at this stage. You understand I have to finish the criminal business.

*McRuer*: May I suggest that this is the only case my client has before the court for trial.

RIDDELL, J.A.: It is not that that influences me; there are other circumstances. I think you will have to take my ruling.

*McRuer*: I do feel we ought to have the verdict of the jury.

RIDDELL, J.A.: I have no doubt that if you did not think so you would not say it.

*McRuer*: We have had our right taken from us, that is, right of trial by jury on the major question of the police officer using his gun. I think it is in the interests of the public that the jury should pass upon those questions.

RIDDELL, J.A.: You said that before.

*McRuer*: I did, and I say it with great earnestness. It is a matter of very vital public interest as to how the law has been administered. I think the people ought not to be deprived of their right of trying their own officials. I cannot conceive why we should be deprived of that right now that the case has gone on, and all we have to do is address the jury; unless your lordship feels the jury might not agree with you on the facts.

RIDDELL, J.A.: I am not troubled as to the finding of the jury.

*McRuer*: That might have great weight when I come to argue the case in the Court of Appeal.

RIDDELL, J.A.: No doubt; but I think the interests of justice will be best met by disposing of the case now.

I direct judgment to be entered for the defendant, dismissing the action with costs.

The jury having returned, the learned Judge said:—

Gentlemen of the jury, I am glad to be able to inform you that, by reason of my ruling upon the law in this case, it will not be necessary for you to determine anything. You are now discharged.

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The plaintiff appealed from the judgment of RIDDELL, J.A.

February 16 and 17. The appeal was heard by MULOCK, C.J.O.,  
MAGEE, HODGINS, FERGUSON, and GRANT, JJ.A.

*McRuer*, for the appellant.

*A. G. Slaght*, K.C., and *Lucas*, for the defendant, respondent.

The arguments of counsel are stated in the judgment of FERGUSON, J.A., *infra*.

The following cases were cited by counsel: *Grainger v. Hill* (1838), 4 Bing. N.C. 212; *McRae v. McLaughlin Motor Car Co. Ltd.*, [1926] 1 D.L.R. 372; *In re Martin* (1882), 20 Ch. D. 365; *Wilson v. Kinnear* (1925), 57 O.L.R. 679.

September 24. FERGUSON, J.A.:—Appeal by the plaintiff from a judgment of Riddell, J.A., dismissing the action.

The plaintiff is a leather-worker, residing in the city of Toronto, and the defendant is a police constable.

In this case the plaintiff joined three causes of action, all arising out of the same set of circumstances. The causes of action alleged are: (1) assault and battery; (2) malicious prosecution; and (3) illegal arrest.

I have read with care the pleadings, evidence and exhibits, in the light of the argument of counsel, and am of opinion that all the points of law and fact involved in the case and necessary for the determination of the appeal are so fully stated and reviewed by the learned trial Judge in his reasons for judgment that it is unnecessary for me to restate them here.

Counsel for the plaintiff contended: (1) that the learned trial Judge erred in striking out the jury in the issue of assault or no assault; (2) that the learned trial Judge erred in accepting the testimony and believing the story of the defendant and his witnesses in preference to that of the plaintiff and his witnesses; and (3) that the learned trial Judge erred in his conclusion of law that the arrest was part of the malicious prosecution proceedings and stood or fell on his findings as to reasonable and probable cause.

There was direct conflict of testimony between the plaintiff and his witnesses and the defendant and his witnesses as to what took place on the night of the 13th November, and particularly in reference to a statement which the defendant's witness Creighton swore the plaintiff made to him as to how it came about that the plaintiff was shot.

Counsel for the plaintiff reviewed all the facts and circumstances in an endeavour to shew that the story of the defendant

and his witnesses should not have been accepted by the trial Judge in preference to that of the plaintiff and his witnesses. Yet, after a careful consideration of all of counsel's arguments, I am not prepared to say either that the learned Judge erred in his findings or that, had I been the trial Judge, I should have taken a different view of the facts.

I also agree with the learned trial Judge in his conclusion that the arrest was made under and pursuant to a warrant issued as a result of the laying of the charge on which the plaintiff bases his claim for malicious prosecution. Counsel for the plaintiff endeavoured to raise and argue the point that the warrant before the Court was illegal because it had not been sealed. That point was not taken or raised before the trial Judge. The defendant swore he had a warrant. The warrant was put in by the plaintiff and was by all parties at the trial treated as a valid one.

Had the point been raised at the trial, the defendant would have been entitled to plead the Public Authorities Protection Act, R.S.O. 1927, ch. 120, secs. 11 to 15 inclusive, and to have offered evidence that the Act had not been complied with. It therefore seems to me that all the evidence necessary to adjudicate on this new point is not now before the Court, and consequently it is not a point that we should, under the practice, allow to be now raised.

That brings me to the question, did the learned trial Judge exceed his jurisdiction or err in striking out the jury in the assault case or issue?

Section 54 of the Judicature Act, R.S.O. 1927, ch. 88, reads:—

"Actions of libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution and false imprisonment shall be tried by a jury unless the parties in person or by their solicitors or counsel waive such trial."

Section 56 reads:—

"Subject to the Rules, except where otherwise expressly provided by this Act all issues of fact shall be tried and all damages shall be assessed by the judge without the intervention of a jury.

"(2) The judge may nevertheless direct that the issues or any of them be tried and the damages assessed by a jury."

Section 57 reads:—

"(1) Subject to the Rules, if a party desires that the issues of fact shall be tried or the damages assessed by a jury he may, at any stage of the proceedings, but not later than the fourth day after the close of the pleadings or if notice of trial or assessment is served before that time, within two days after service of

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such notice or within such other time as may be allowed by a judge, file and serve on the opposite party a notice in writing requiring that the issues be tried or the damages assessed by a jury, and if such notice is given, subject to subsection 3, they shall be tried or assessed accordingly.

"(2) A copy of the notice shall be attached to the certified copy of the pleadings prepared for use at the trial.

"(3) Notwithstanding the giving of the notice the issues of fact may be tried or the damages assessed without the intervention of a jury if the judge presiding at the sittings so directs or if it is so ordered by a judge.

"(4) Subsection 1 shall not apply to causes, matters or issues over the subject of which before the Administration of Justice Act, 1873, the Court of Chancery had exclusive jurisdiction."

Section 63\* reads:—

"In actions for malicious prosecution, the judge shall decide all questions both of law and fact necessary for determining whether or not there was reasonable and probable cause for the prosecution."

Counsel for the appellant argued that he had a *primâ facie* right to have this issue tried by a jury and that the learned trial Judge interfered with that right without just and sufficient cause.

Counsel for the respondent in answer contended:—

1. That, under the foregoing sections of the Judicature Act and Rule 398,† the learned trial Judge had jurisdiction and an absolute and unreviewable discretion to strike out the jury in all cases and issues other than those enumerated in sec. 54, and in

\* This is in the same words as sec. 62 of R.S.O. 1914, ch. 56, cited by the trial Judge.

† 398.—(1) When an application is made to a Judge in Chambers for an order striking out a jury notice, and it appears to him that the action is one which ought to be tried without a jury, he shall direct that the issues shall be tried and the damages assessed without a jury, and in case the action has been entered for trial shall direct the action to be transferred to the non-jury list.

(2) The refusal of such an order by the Judge in Chambers shall not interfere with the right of the Judge presiding at the trial to try the action without a jury. Nor shall an order made in Chambers striking out a jury notice interfere with the right of the judge presiding at the trial to direct a trial by jury.

(3) The Judge presiding at a jury sittings in Toronto may in his discretion strike out the jury notice and transfer the action for trial to a non-jury sittings, and this power may be exercised notwithstanding that the case is not on the peremptory list for trial before the said Judge.



support of this proposition he quoted sections of the Act and the Rules, and cited *Wilson v. Kinnear*, 57 O.L.R. 679.

2. That, even if the discretion of the learned trial Judge is reviewable, we should not, in the circumstances disclosed in this case, interfere with what had been done by the learned trial Judge.

Mr. Slaght contended that, as sec. 63 of the Judicature Act cast upon the learned trial Judge the duty of finding the facts necessary to determine whether or not there was reasonable or probable cause for the prosecution alleged, it was absolutely necessary for him to find whose evidence was to be believed as to what took place on the night of the alleged assault, and that, had the learned trial Judge not exercised his discretion as he did, we might have had the jury, on the issue of assault, taking a different view from that of the trial Judge as to whose evidence was to be believed as to what took place on the night of the assault. These circumstances, Mr. Slaght argued, justified the learned trial Judge in striking out the jury.

I am clearly of the opinion that the circumstances disclosed in evidence and particularly the situation pointed out by Mr. Slaght in his second proposition justified the learned trial Judge in exercising his discretion in the manner he did, and that it is therefore unnecessary to express an opinion as to our right to review an order made by a trial Judge striking out a jury notice.

I would, for these reasons, dismiss the appeal with costs.

MULOCK, C.J.O., and HODGINS and GRANT, JJ.A., agreed with FERGUSON, J.A.,

MAGEE, J.A., dissented.

*Appeal dismissed.*

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[HODGINS, J.A.]

PATTERSON V. PATTERSON.

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Oct. 3.

*Husband and Wife—Judgment for Alimony—Sale of Husband's Interest in Land to Satisfy Arrears—Amount Recoverable—Temporary Resumption of Cohabitation—No Effect as to Arrears—New Situation Created as to Payments Accruing after Resumption—Judicature Act, R.S.O. 1927, ch. 88, secs. 2, 76—Jurisdiction in Alimony—Judicature Act, R.S.O. 1897, ch. 51, sec. 34.*

The plaintiff in February, 1924, recovered a judgment against the defendant for alimony. Payments under the judgment being in arrear,

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the plaintiff, in 1928, applied for an order for leave to sell the defendant's interest in certain land in order to satisfy the arrears. It appeared that the defendant and plaintiff had lived together as man and wife for about a month at the end of 1927. The plaintiff swore that the defendant lived with her during this month at her parents' home, and left her early in January, 1928, and she had not lived with him since. The defendant swore that his home had been and still was open for her to return to at any time, and that it was at his home that they lived together for a month:—

*Held*, that the plaintiff was entitled to an order for sale, but that the amount recoverable must be limited to the arrears that accrued up to the 1st December, 1927.

By the cohabitation which began then and lasted until the beginning of January, 1928, a different situation was created: she must shew that his leaving was without sufficient cause and under circumstances which would entitle her to a decree for restitution of conjugal rights. Reference to the Judicature Act, R.S.O. 1897, ch. 51, sec. 34, shewing the jurisdiction in respect of alimony which was vested in the Supreme Court of Ontario on the 31st December, 1912: Judicature Act, R.S.O. 1927, ch. 88, sec. 2.

The husband's later separation from his wife may have been her fault.

Resumption of cohabitation does not affect arrears, unless facts are shewn which would induce the Court to modify or reduce the amount for which the judgment is to be enforced.

AN application by the plaintiff for an order for leave to sell the defendant's interest in certain land under a judgment for alimony dated the 19th February, 1924.

October 1. The application was heard by HODGINS, J.A., in the Weekly Court, Toronto..

*A. A. Macdonald*, for the plaintiff.

*J. H. L. Morgan*, for the defendant.

October 3. HODGINS, J.A.:—The arrears under the judgment up to the 19th May, 1928, amount to \$564 and \$45.95 for interest.

The defendant's interest in the land is that of life-tenant, but no valuation of that interest is put in. The plaintiff's affidavit contains the statement that "I have at all times since the said judgment was delivered lived separate and apart from the defendant, and have otherwise complied with the conditions of the said judgment."

In answer the defendant swears that "the fact is that my said wife returned to our home about the beginning of December, 1927, and stayed with me there till about the beginning of January, 1928, and during this time we cohabited with each other as man and wife. . . . My said wife is also in error in stating in her affidavit that she is forced to depend upon the

charity of friends and relatives for her livelihood, because she well knows that my home has been open for her to return to at any time, and I have been at all times and still am prepared to provide for her in my own home and perform all my obligations to her as a good husband."

In reply the wife says:—

"Some time about the 1st December, 1927, the defendant came to the home of my parents, with whom I resided, and lived there with me for about four weeks.

"My husband, on or about the 1st January, 1928, left me, and except for the period above mentioned in the month of December, 1927, I have at no time since the month of February, 1924, lived with the defendant."

Her excuse for ignoring the fact that cohabitation was resumed is that "I failed to understand the exact meaning of the words used by me in that respect."

Alimony under our law may be granted to any wife whose husband "lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights," and by the judgment herein the alimony given "shall continue until the further order of the Court:" Judicature Act, R.S.O. 1897, ch. 51, sec. 34.\*

The judgment when registered binds the estate of the defendant in the lands specified "in the same manner and with the same effect as the registration of a charge by the defendant of a life annuity on his land:" Judicature Act, R.S.O. 1927, ch. 88, sec. 76.

The plaintiff is entitled to an order for sale, but the amount recoverable must, in my judgment, be limited to the arrears which accrued up to the 1st December, 1927.

\* By sec. 2 of the Judicature Act, R.S.O. 1927, ch. 88, "the Supreme Court shall be continued as a superior court of record, having civil and criminal jurisdiction, and it shall have all the jurisdiction, power and authority which on the 31st day of December, 1912, was vested in or might be exercised by the Court of Appeal or by the High Court of Justice or by a Divisional Court of that Court, and such jurisdiction, power and authority shall be exercised in the name of the Supreme Court."

Section 3 of the Judicature Act, R.S.O. 1914, ch. 56, is in the same words and so is sec. 3 of the Judicature Act, 1913, 3 & 4 Geo. V. ch. 19.

The jurisdiction in respect of alimony vested in the Court on the 31st day of December, 1912, is defined in the Judicature Act, R.S.O. 1897, ch. 51, sec. 34, as quoted above.

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By the cohabitation which began then and lasted till the beginning of January, 1928, a different situation was created, and when the husband again left his wife she must shew that his leaving was without sufficient cause and under circumstances which would entitle her to a decree for restitution of conjugal rights. What those circumstances were I do not know, but they are and must be different from those on which the judgment was founded.

I have not overlooked the different versions given by husband and wife as to the place where cohabitation was resumed. The husband says it was at his home and the wife says it was at her parents' residence, where she was living; but, wherever it was, the husband's later separation from his wife may have been the fault of the wife and not of the husband. See *Bird v. Bird* (1921), 52 O.L.R. 1; *Forster v. Forster* (1909), 1 O.W.N. 92, 419, 14 O.W.R. 796, 801; *Lee v. Lee* (1926), 59 O.L.R. 561.

Lord Justice Lindley in *Watkins v. Watkins*, [1896] P. 222, 226, says:—

“Permanent alimony for a judicially separated wife is and always has been inalienable by her. The Court which ordered it never lost control over it, and she could not by assignment or otherwise deprive herself of her right to it so long as she and her husband lived separate and apart from each other.”

One act of intercourse is not sufficient to put an end to the right to payment under a separation deed. Nor several such acts unless other sufficient circumstances are shewn: *Rowell v. Rowell*, [1900] 1 Q.B. 9. Nor unless an intention to abrogate the deed is shewn: *Bowers v. Bowers* (1915), 34 O.L.R. 463.

Resumption of cohabitation does not affect arrears: *Macan v. Macan* (1900), 70 L.J.Q.B. 90; unless facts are shewn which would induce the Court to modify or reduce the amount for which the judgment is to be enforced: *Campbell v. Campbell*, [1922] P. 187.

I see no reason for reducing the amount for which the judgment may be enforced except as I have stated. No costs.

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[ORDE, J.A.]

REX V. HIGGINS.

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Oct. 11.

*Criminal Law—Driving Motor-vehicle while Intoxicated—Criminal Code, R.S.C. 1927, ch. 36, sec. 285 (4)—Magistrate's Conviction—Alternative Offence—"Care or Control" of Vehicle—Vehicle not Capable of being Driven.*

Section 285, subsec. 4, of the Criminal Code deals with two alternative offences, *driving* a motor-vehicle while intoxicated and *having the care or control* of a motor-vehicle while intoxicated.

The defendant, driving his motor-car upon a highway, ran into a ditch and so damaged his car that it could not be operated. While waiting for the arrival of a repair-truck, the defendant became intoxicated, and when the repair-truck arrived and was towing the car from the ditch, he was observed standing on the running board of his car, holding the steering wheel, and so assisting in guiding the towed car from the ditch to the highway. He was convicted by a police magistrate of unlawfully driving a motor-vehicle upon a highway, in an intoxicated condition, contrary to sec. 285 (4). Upon a case stated by the magistrate, it was *held* that his finding that the defendant while intoxicated was in charge of a motor-vehicle did not justify a conviction for driving while intoxicated.

Nor could the defendant be convicted of the alternative offence, for the subsection cannot apply to a vehicle which is out of commission and cannot be operated under its own power.

CASE stated by the Police Magistrate for the City of Belleville under sec. 761 of the Criminal Code, R.S.C. 1927, ch. 36.

October 9. The case was heard by ORDE, J.A., in the Weekly Court, Toronto.

C. A. Payne, for the accused.

W. B. Common, for the Crown.

October 11. ORDE, J.A.:—The accused was summarily convicted upon the charge that he "did unlawfully drive a motor-vehicle on provincial highway number 2, in an intoxicated condition, contrary to section 285, subsection 4, of the Criminal Code."

The facts upon which the conviction was made are set forth in the stated case and are, shortly, as follows:—

The accused, while driving his motor-car upon a highway between Trenton and Belleville at night, ran into a ditch and so damaged his car that it could not be operated. Help was summoned from Trenton, and a man with a repair-truck came to the scene of the accident and after attaching the truck to the accused's car towed it from the ditch and into Belleville.

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While the accused was waiting for the arrival of the repair-truck, a passing motorist stopped and, owing to the nervous condition of the accused, offered him some liquor from a flask, and the accused took three or four drinks therefrom, and the learned magistrate finds as a fact that the accused thereby became intoxicated. While the car was being towed from the ditch two constables arrived and observed the accused standing on the running board of his car and holding the steering wheel and so assisting in guiding the towed car from the ditch to the highway.

Upon the evidence the magistrate found that the accused was in charge of the car within the meaning of sec. 285, subsec. 4, and convicted him of the offence charged in the information.

The stated case submits two questions of law:—

1. "Was I right in holding that the accused was in charge of the motor-vehicle (after the repair-truck and the employees of the garage had arrived and had physical possession of the motor-vehicle) within the meaning of said section 285, subsection 4, of the Criminal Code?"

2. "Was I right in holding that the motor-vehicle, by reason of its position in the ditch and the fact that it was incapable of being operated and could not be operated or moved except by some external force, after the accident was a motor-vehicle within the meaning of section 285, subsection 4, of the Criminal Code, or could the accused be convicted of the offence charged by reason of the facts aforesaid?"

Subsection 4 of sec. 285 is as follows:—

"4. Every man who while intoxicated or under the influence of narcotics drives any motor-vehicle or automobile or has the care or control of a motor-vehicle or automobile whether it is in motion or not shall be guilty of an offence and liable upon summary conviction," etc.

This section deals with two alternative offences, namely, *driving* a motor-vehicle while intoxicated and *having the care or control* of a motor-vehicle while intoxicated.

The accused was charged with driving a motor-vehicle while intoxicated and was convicted of that offence. It is quite clear, and the magistrate so states, that there was no evidence of any intoxication while the accused was driving the car and that it was only after the car was wrecked that he became intoxicated. The finding by the magistrate that the accused while intoxicated was in charge (the words of the statute are "has the care or control") of a motor-vehicle cannot justify a conviction for driv-

ing while intoxicated. And the magistrate does not appear to have exercised any power he might have had to amend the information so that the conviction might be based upon the facts as he found them.

I might upon that ground alone quash the conviction, but that might mean the laying of a new charge and the re-statement of the case.

Had the accused "the care or control of a motor-vehicle" at the time he was intoxicated within the meaning of subsec. 4? In one sense he had, because it was his car, and the truck-driver who was towing it was subject to his orders. But if these words are to apply to such a case it leads to some absurd results. For example, an intoxicated man while in his house, perhaps confined to bed, has the care or control of his car standing in the street outside his house. The Act could not possibly have been intended to apply in that case. I think it is clear that the provision as to care or control was intended as an alternative to the driving of the car, so as, for example, to provide for the conviction of an intoxicated driver sitting in his car while at rest, or of an intoxicated owner driven in his car by a chauffeur obliged to obey his orders. But I think the section must be confined to a motor-vehicle which is either being driven or is capable of being driven, and cannot apply to a car which is out of commission and cannot be operated under its own power. The whole of sec. 285 deals with offences relating to the operation and driving of motor-vehicles. The motor-car here was not capable of being driven at the time of the alleged offence, and in my judgment the learned magistrate was wrong in holding that the accused was guilty of any offence under subsec. 4.

By reason of his intoxication in a public place the accused may, of course, have been guilty of some offence either under the Criminal Code or under some provincial statute, but that does not justify his conviction under the section in question.

The answer to both questions must be in the negative.

The conviction should be quashed with the usual provision for the protection of the magistrate.

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Oct. 12.

*Practice—Writ of Summons—Addition of Defendants—Issue of Concurrent Writ—Service on Added Defendants after Expiry of Year from Issue—Rules 9, 134(3), 135.*

This action, originally against one defendant only, was commenced by the issue of a writ of summons for service out of Ontario, and the writ and statement of claim were served within a year after the issue. Shortly before the expiry of the year an order was made giving the plaintiff leave to add two defendants, to claim such relief as he might be advised, and to amend the writ and statement of claim accordingly. After the expiry of the year, the plaintiff obtained an *ex parte* order allowing him to issue a concurrent writ for service within the jurisdiction upon the added defendants. The original writ of summons and the statement of claim were then amended, and a concurrent writ was issued and served upon the added defendants, who thereupon moved to set aside the service, upon the ground that more than a year had expired since the issue of the original writ, and that the writ, not having been renewed, was no longer in force:—

*Held*, that when an action has been regularly begun and the writ duly served before its expiry, its purpose has been served—it cannot be said to have expired even after the year has passed; the Court, being duly seised of the action, may exercise the power to add parties at any time either before or after the year, without any renewal of the writ.

*Semble*, it was unnecessary to issue a concurrent writ. Rules 9, 134, especially para. (3), and 135, considered.

AN appeal by the plaintiff from an order of the Master setting aside a concurrent writ of summons, the service thereof, and other proceedings.

October 12. The appeal was heard by ORDE, J.A., in Chambers.

W. R. Smyth, K.C., for the plaintiff.

M. H. Ludwig, K.C., for the defendants Ludwig and Ballantyne.

ORDE, J.A.:—The plaintiff appeals from an order of the Master, dated the 10th October, 1928, setting aside the concurrent writ of summons and the service thereof, the amended statement of claim and the service thereof, and an earlier *ex parte* order of the Master giving the plaintiff leave to issue a concurrent writ of summons for service upon the defendants Ludwig and Ballantyne.

The situation which has arisen is rather unusual. The action was commenced on the 18th June, 1927, by a writ for service



out of the jurisdiction, against Hugo Greef, of London, England, for the specific performance of an agreement to redeem certain property which had been sold for taxes and in which the plaintiff claimed an interest. There was some delay in effecting service, which resulted in service of the writ and of the statement of claim being made substitutionally upon Mr. M. H. Ludwig, K.C., as the defendant's solicitor, some time in February, 1928.

The statement of claim alleged that the agreement sought to be enforced had been made by the defendant Greef through his solicitors in Toronto. By the statement of defence, delivered on the 29th February, 1928, by Messrs. Ludwig and Ballantyne as Greef's solicitors, the defendant, among other things, denied that any solicitor or agent in Toronto or elsewhere had any authority to make the alleged agreement.

The plaintiff thereupon moved to add Messrs. Ludwig and Ballantyne as defendants to the action in order to set up against them an alternative claim for damages for breach of warranty of authority. This motion was dismissed by the Master, but upon an appeal from such dismissal Mr. Justice Raney made an order, on the 8th June, 1928, giving the plaintiff leave to add Ludwig and Ballantyne as defendants and to claim such relief as he might be advised, and also to amend the writ of summons and statement of claim accordingly.

For some reason, not quite clear to me, this order of the 8th June, 1928, was not settled or issued until the 20th September, 1928. On the 21st September, 1928, the plaintiff obtained an *ex parte* order from the Master granting leave to issue a concurrent writ for service within the jurisdiction upon the added defendants Ludwig and Ballantyne.

On the 22nd September, 1928, the original writ of summons of the 18th June, 1927, and the statement of claim were duly amended in accordance with Mr. Justice Raney's order, and a concurrent writ for service within the jurisdiction was also issued. The teste of this concurrent writ is, of course, as of the 18th June, 1927, the date of the original, but the marginal note gives the date of its actual issue, namely, the 22nd September, 1928. On the same day the concurrent writ (shewing of course the amendments made to the original writ) and the amended statement of claim were served upon the defendants Ludwig and Ballantyne.

The defendants Ludwig and Ballantyne thereupon moved before the Master to set aside the service of the writ upon them,

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upon the ground that more than 12 months had expired since the issue of the original writ, and that the writ, not having been renewed, was no longer in force.

The learned Master gave effect to this contention, setting aside the concurrent writ and the service thereof and of the amended statement of claim upon the defendants Ludwig and Ballantyne. In his reasons he apparently takes for granted the necessity for renewing the writ (in fact, counsel for both parties seem to have thought renewal was necessary), and suggests that my brother Raney might have renewed the writ when he made his order of the 8th June, 1928, which was still within the year, but that, having regard to the doubt expressed by my brother Middleton in *Prescott v. McArthur* (1928), 62 O.L.R. 385, he felt himself powerless to order the renewal of the writ after the year had expired.

This of course leads to an extraordinary result. Notwithstanding that Ludwig and Ballantyne have been duly added as defendants, under Rule 134, they cease to be defendants because the original writ upon which the action had been based had run for more than twelve months before they were served with a copy of the writ and the statement of claim. Followed to its logical conclusion this would mean that if, at the trial of an action more than a year after the issue of the writ, the trial Judge should see fit to add some one as a party defendant, his order would be futile because the writ was more than a year old, or, assuming that it is possible to renew the writ after the expiration of the year, the trial Judge must go through the ridiculous and useless formality of directing the renewal of the writ.

In the present case the apparent necessity for issuing a concurrent writ has tended to complicate what was really a very simple situation. The original writ had been duly served in time, and this action against the first defendant was therefore properly and regularly before the Court. That being so, the Court had complete power under Rule 134 to add other defendants and to do so whether the writ was more than a year old or not. The parties so added as defendants become parties, not by virtue of the amendments made to the writ or through any service of the amended writ upon them, but by virtue of the order itself. They are parties from the moment the order is made. Service upon them of a copy of the writ or of any other proceeding is intended, just as service of a writ of summons upon the original defendant is intended, to notify him of the plaintiff's claim

against him and to summon him to appear before the Court to answer it. Orde, J.A.

Paragraph 3 of Rule 134 reads as follows:—

“(3) Parties added or substituted as defendants shall, unless otherwise ordered, be served with the amended writ of summons, and the proceedings as against them shall be deemed to have begun only at the time when they are added.”

Service of the writ under this rule may be dispensed with. Where the order adding a defendant is made before any other step has been taken, service of the writ ought not to be dispensed with, because the writ is at that stage the only proceeding which discloses the nature of the action, though, where the added defendant is also the solicitor for the original defendant or is already represented by the same solicitor, service might even in that case be dispensed with.

In this case a statement of claim had been delivered, and there was really no necessity for service of the writ upon the added defendants, and that might well have been dispensed with. Service of the amended statement of claim as provided by Rule 135 would have sufficed.

When an action has been regularly begun by writ of summons and that writ has been duly served before its expiry, then its purpose has been served. It cannot be said to have “expired,” even after the year has passed. The Court is duly seised of the action, and, if further parties are to be added, the Court may exercise the power to add them at any time, either before or after the year, without any renewal of the writ. Rule 9\* as to the renewal of the writ has no application whatever in such case.

The order adding the defendants here did not dispense with service of the writ. But I am not at all sure that it became really necessary to issue a concurrent writ at all. Service of a copy of the original writ would have sufficed to bring the matter formally to the notice of the added defendants, and there is nothing in the body of a writ issued for service out of the jurisdiction to which a defendant served within the jurisdiction can really object.

The argument that if a plaintiff can be permitted to add a defendant, without any obligation to keep or get the original writ

\* 9. The writ shall be in force for twelve months from the date thereof, including the day of such date; but if for any sufficient reason any defendant has not been served, the writ may at any time before its expiration, by order, be renewed for twelve months, and so from time to time during the currency of the renewed writ. The writ shall be marked by the proper officer, “renewed,” with the date of the order.

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renewed, the defendant may be prejudicially affected in some way, for example, in pleading the Statute of Limitations, is completely met by the concluding words of para. 3 of Rule 134 above quoted. It is immaterial when the writ was issued; the proceedings as against the added defendant are in effect only begun on the date of the order making him a party.

It is not necessary to discuss whether or not, having regard to the express language of Rule 9, there is any power under Rule 176 to renew a writ after the year has expired. As I have said, Rule 9 has no application to the present case.

The appeal must be allowed and the order of the learned Master set aside. The service of the writ and statement of claim upon the added defendants will therefore stand as effective. They ought to be allowed 10 days from this date for the delivery of their defence.

The costs of this motion and of the motion to set aside the concurrent writ and the service thereof will be to the plaintiff in the cause.



## [APPELLATE DIVISION.]

RE JURY GOLD MINE DEVELOPMENT CO. LTD.

1928.

Oct. 5.

*Company—Application by Minority Shareholder for Winding-up Order—Companies Act, R.S.O. 1927, ch. 218, sec. 214 (c)—“Just and Equitable”—Mining Company—Speculative Undertaking—Absence of Fraud.*

A shareholder of a mining company, incorporated under the Ontario Companies Act, applied for an order for the winding-up of the company under sec. 214 (c) of the Act, now R.S.O. 1927, ch. 218, providing that the order may be made “where in the opinion of the Court it is just and equitable for some reason other than the bankruptcy or insolvency of the corporation that it should be wound up.” The applicant was a minority shareholder, holding 37,500 shares of the total capitalization of 2,000,000 shares. The property owned by the company was an undeveloped mining location of merely speculative value. The location was intact and there were practically no liabilities, but the actual cash in the treasury was trifling:—

*Held*, that the case was not brought within the class of cases in which a winding-up is ordered because the whole substratum of the undertaking has disappeared; and the applicant, being a minority shareholder, must submit to the will of the majority—in the absence of fraud or transactions *ultra vires*, the will of the majority must govern.

A winding-up order made by a Judge, apparently upon the ground that the undertaking was so speculative and hazardous that the company ought not to be permitted to operate further, was set aside on appeal.

Remarks on the application of the words “just and equitable.”

*Symington v. Symingtons’ Quarries Ltd.* (1905), 8 Sess. Cas. (5th series) 121, applied.

AN appeal by the company from an order of RANEY, J., in Chambers, directing its winding-up.

September 19. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, JJ.A.

*George Wilkie*, K.C., for the appellant company.

*T. Delaney*, for the petitioning shareholder, respondent.

Judgment allowing the appeal was delivered at the close of the argument, but to avoid uncertainty and misunderstanding the Court thought it expedient that the reasons for the decision should be stated in writing.

October 5. Reasons were read by MIDDLETON, J.A., as follows:—An appeal by the company, pursuant to leave granted by Mr. Justice Hodgins, from an order made by Mr. Justice Raney directing the winding-up of the company, which was in-

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corporated under the Ontario Companies Act. The order purported to be made under the provisions of sec. 214 (c) of the Companies Act, R.S.O. 1927, ch. 218. This section provides that the order may be made "where in the opinion of the Court it is just and equitable for some reason other than the bankruptcy or insolvency of the corporation that it should be wound up."

The applicant is a minority shareholder, holding 37,500 shares of the total capitalization of 2,000,000 shares. He is dissatisfied with the way in which the affairs of the company are being carried on, in so far as they are being carried on at all. The property owned by the company is an undeveloped mining location. What its real value is, is quite unknown. The whole proposition is of an intensely speculative nature. While the petitioner's holding stated in shares is nominally large, he does not disclose what he actually paid for it, probably a very small sum, as many shares have been sold for one or two cents a share.

The order appears to have been made largely upon the theory that the undertaking was so extremely speculative and hazardous that the company ought not to be permitted to operate further. The case is not brought within the class of cases in which a winding-up is ordered because the whole substratum of the undertaking has disappeared. Here the location remains intact but is yet substantially undeveloped. The actual cash in the treasury is trifling. There are practically no liabilities. It is said that some small salaries are payable, but this is denied. The officers, it is said, are doing their work gratuitously.

The words "just and equitable" in this and kindred statutes have given rise to much difference of judicial opinion. No Court has yet laid down any satisfactory classification indicating all the cases which can possibly be brought within the statute, nor is it desirable that any attempt should be made to do so, but from the series of cases certain fairly well defined principles have emerged indicating the circumstances in which the Court should act. These are well stated by the Court of Session in *Symington v. Symingtons' Quarries Ltd.* (1905), 8 Sess. Cas. (5th series) 121, at p. 129: "If the Court finds that the real substratum of the company has gone, or if the company has come to a deadlock, they will consider themselves justified in acting under that subsection. On the other hand, they certainly will not allow the aid of that section where all that has happened is merely what you may call a domestic quarrel between two sets of shareholders. The company itself is the proper *forum* for the settlement of domestic differences, according to the powers of

the majority under the constitution of the company." The question as to what is meant by a deadlock is further explained. The situation referred to is one analogous to that existing in a partnership where there is a small number of persons equally or nearly equally divided, so that it is impossible that the business of the company can be carried on. "That is a rule that would very seldom be applicable to a company under the Companies Act—never certainly where the company appeals to the public for subscription to its shares—because if the directors are equally divided, or if there is such a division as makes it difficult to carry on the company's affairs, the remedy of the shareholders is to turn them out and to elect a harmonious board of directors."

This, of course, has no application to the case of a dissatisfied shareholder who is not a director. He is a minority shareholder and must endure the unpleasantness incident to that situation. If he choose to risk his money by subscribing for shares, it is part of his bargain that he will submit to the will of the majority. In the absence of fraud or transactions *ultra vires*, the majority must govern, and there should be no appeal to the Courts for redress. This is the situation here, and the application for winding-up is quite misconceived. If there is any misapplication of the assets, the applicant is not without remedy, for he can bring an action on behalf of himself and other shareholders, making the company and the directors against whom he charges wrongdoing parties defendant.

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[APPELLATE DIVISION.]

DUCHMAN v. OAKLAND DAIRY CO. LTD.

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Oct. 17.

*Nuisance—Dairy—Noise Created by Operations—Disturbance of Neighbours' Comfort—Implied Easement or Obligation in Regard to Noise at Time when Neighbours Acquired Title from Owner of Dairy Premises—Registry Act—Notice—Damages in Lieu of an Injunction—Judicature Act, R.S.O. 1914, ch. 56, sec. 18—Acquiescence—Costs.*

In an action brought by several plaintiffs, owning property adjacent to or near the defendants' dairy, to restrain the defendants from continuing in the operation of their dairy, in the early mornings, to disturb the sleep of the plaintiffs and their families by noises, it appeared that the dairy had been operated from 1897 until the present time continuously, except for a short interval in 1914. The trial Judge, in lieu of an injunction, awarded the several plaintiffs damages, pursuant to sec. 18 of the Judicature Act, R.S.O. 1914, ch.

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56, and it was admitted that the damages awarded were to be taken as relating solely to injuries suffered during the period ending with the judgment. The lands of the plaintiffs were acquired from one G., who was, in 1911, the owner of all the lands now held by the defendants and the plaintiffs, and through whom the defendants acquired the land upon which the dairy stood.

Upon appeal by the plaintiffs and cross-appeal by the defendants from the judgment at the trial, it was *held*, upon the evidence, that the noise and disturbance made by the defendants were such as materially to interfere with the reasonable comfort of the neighbours, and constituted a nuisance.

The defendants set up 'that the plaintiffs' predecessors in title and the plaintiffs themselves took their lands subject to a right on the part of G. by way of an implied easement attaching to the lands retained by him to continue the dairy business on those premises:—

*Held*, by RIDDELL and MASTEN, J.J.A., that the right which G. retained was a quasi-easement attached to the land retained by him, and, being an implied easement, did not fall within the provisions of the Registry Act.

*Israel v. Leith* (1890), 20 O.R. 361, and *Myers v. Johnston* (1922), 52 O.L.R. 658, followed.

But *held*, that the defendants had exceeded the limits permitted by the easement, and, in respect of the excess, damages were properly awarded by the trial Judge.

*Per* MIDDLETON and ORDE, J.J.A., that the right of G. and the defendants to continue the dairy business, even though that involved committing a nuisance, rested, not upon an implied easement, but upon an implied covenant or obligation on the part of the plaintiffs and their predecessors not to complain of that which it was the common understanding of all parties should be done and carried on after the grant; and the right or immunity is an equitable right based upon an implied negative obligation, and so was within the provisions of the Registry Act (sec. 72 of the present Act, R.S.O. 1927, ch. 155) and void as against a registered instrument executed by the same party. The original grantee would still be bound, but he sold to the plaintiff G. in 1922, and D., taking by registered conveyance without actual notice, was entitled to complain not merely of the excessive user but of the entire nuisance caused by the carrying on of the business.

Review of the authorities by MIDDLETON and MASTEN, J.J.A.

*Browne v. Flower*, [1911] 1 Ch. 219, approved in *Harmer v. Jumbil* (Nigeria) *Tin Acres Ltd.*, [1921] 1 Ch. 219, particularly referred to by MIDDLETON, J.A.

*Per Curiam*:—The plaintiff D. was entitled to an injunction restraining the defendants from conducting their business in such a way as to create any disturbance in excess of that customarily created by their predecessors at the time when the easement or obligation arose; the conduct and acquiescence of two of the other plaintiffs precluded them from any recovery; and the two remaining plaintiffs were not entitled to an injunction but should have the damages awarded by the trial Judge.

*Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, followed as to the interpretation of sec. 18 of the Judicature Act (Lord Cairns' Act).

Question of costs of action, appeal, and cross-appeal, considered.

APPEAL by the plaintiffs and cross-appeal by the defendant company from the judgment of KELLY, J., at the trial (10th



June, 1927) of an action brought by six plaintiffs for an injunction restraining the defendants from further maintaining an alleged nuisance. By the judgment of KELLY, J., in lieu of an injunction damages were awarded to each of the several plaintiffs.

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April 16 and 18. The appeal and cross-appeal were heard by RIDDELL, MIDDLETON, MASTEN, and ORDE, JJ.A.

*G. N. Shaver*, for the plaintiffs.

*The Hon. N. W. Rowell*, K.C., for the defendant company.

October 17. MASTEN, J.A.:—In lieu of the injunction claimed, the judgment awards damages to the respective plaintiffs as follows—to Duchman \$400, to the Mosts \$50, Klein \$40, Applebaum \$25, and Labowitz \$25.

At the trial the plaintiffs sought by their evidence to establish various injurious practices on the part of the defendant company, but in his able argument before us counsel for the plaintiffs wisely and properly limited his complaint to the question of nocturnal disturbance resulting in substantial interference with the sleep of the plaintiffs and their families.

Counsel for the plaintiffs also most properly stated that, while not satisfied with the amount of the damages awarded, he would be unable successfully to attack the quantum of such damages if the judgment in its present form is maintained.

Counsel for the respondent company admitted that the damages awarded by the judgment are to be taken as relating solely to injuries suffered during the period ending at the date of the judgment and do not cover injuries subsequent to the date of the judgment.

Thus the points to be determined on the present appeal are narrowed to two. *First*, are the plaintiffs entitled to relief, and *second*, if they are so entitled can this Court say that Kelly, J., under the circumstances here shewn, wrongfully exercised the judicial discretion vested in him by sec. 18\* of the Judicature Act,

\* 18. Where the Court has jurisdiction to entertain an application for an injunction against a breach of a covenant, contract or agreement or against the commission or continuance of a wrongful act, or for the specific performance of a covenant, contract or agreement, the Court may award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be ascertained in such manner as the Court may direct, or the Court may grant such other relief as may be deemed just.

Section 17 of the Judicature Act, R.S.O. 1927, ch. 88, is in the same words.

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I cannot better state the facts than by quoting the clear and succinct statement of the trial Judge:—

“Defendants carry on a dairy business on property of theirs on the north side of Nassau-street in Toronto. On the property are three buildings referred to at the trial as No. 1 (used as a store and office with living apartments), No. 2 (used principally as a receiving building for the dairy) adjoining No. 1 on the north, and No. 3 (used for pasteurizing and otherwise preparing the milk for delivery and from which milk is shipped) immediately adjoining No. 2 on the north. The part of the property immediately to the west of buildings numbers 1 and 2 is a private lane owned and used by defendants as a means of access to the buildings, but which has no outlet for vehicles otherwise than to Nassau-street. Immediately to the west of the lane is plaintiff Duchman’s dwelling house (No. 112 Nassau-street) in which he and his family reside; and to the west of that are in succession the dwellings of the other plaintiffs—namely, 114 (Most), 116 (Klein), 118 (Applebaum), and 120 (Labowitz). Adjoining the Labowitz property to the west is one other house (No. 122), to the west of which is a publicly used lane running northerly from Nassau-street. To the north of and adjoining No. 122 and the property of plaintiffs is other property of defendants (running from said last mentioned lane easterly to said building No. 3) on which in 1923 they built a garage and stable which from November of that year they have used in connection with their dairy business. In the upper storey of this building their horses are stabled.

“Milk is brought in motor-trucks through the lane leading from Nassau-street to the above referred to buildings Nos. 2 and 3; and, when there treated and prepared for distribution, it is taken in horse-drawn wagons for delivery to retail customers, while that dealt with by wholesale is removed in trucks. The limited space in the land and upon the premises to which it leads does not permit of more than one vehicle being in the lane at any time and prevents the trucks and wagons turning upon the premises; and the vehicles are therefore backed into the lane from Nassau-street, and then driven out. To reach this lane from the said garage and stable the vehicles pass into and along the said publicly used lane to and thence southerly along Nassau-street.

“What are alleged in the statement of claim as grounds for

action are 'the constant noise resulting from the loading and unloading of the defendants' wagons and motor-trucks; the stamping and kicking of the defendants' horses; the rattling of the wagons and trucks and their contents; and the yelling of the defendant company's servants and employees while engaged in their duties.

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"The locality in which these properties are situated, comprising several city blocks, is largely a Jewish residential district in which, however, are many places of business, such as stores, garages, stables, factories, building premises, etc., and not a few carry on small businesses in their dwellings. The locality is undergoing a continual change and is gradually losing its residential character. Applications for permits to convert dwelling houses into business places are increasing.

"A dairy business has been carried on in defendants' Nassau-street premises for very many years by defendants and their predecessors; in late years it has grown in volume and importance and its methods are kept up to a high standard. In 1916 and 1917 the retail part of the business was discontinued for the time being, owing to the absence on war-service of some connected therewith, the wholesale business, however, continuing. In 1922 the retail business was renewed, and it has since increased in volume. The more serious part of plaintiffs' complaint is directed against the retail operations—in fact, no complaint was made prior to the resumption of the retail business and very little of any kind until shortly before this action.

"The dairy buildings and stable and garage are clean, carefully kept, and tidy, and are of modern construction and equipment: so much is well established not only by the uncontradicted evidence of the defendants themselves but by that of disinterested witnesses—some of official position, such as an inspector of the city board of health, and a city director of household and industrial hygiene, whose duty it is to inspect such places. . . . In a word, all the buildings in use by the defendants in the business are efficiently equipped, used, and maintained, and no serious criticism has been offered or even suggested against them . . . There are other circumstances too which bear upon and help to explain the real situation. When the defendants were about to petition for an amendment of a city by-law so as to permit them to build their stable and garage, the petition was signed by plaintiffs Klein, Applebaum (by her husband), and Labowitz, all of whom were shewn the plans of the proposed building and given



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full information about it, and were made aware that the building would provide stabling for 20 to 25 horses. I do not accept their evidence that they were not made aware of the character of the proposed building and the purposes for which it was intended. Klein later on, at the city-hall, had his signature removed from the petition. Mrs. Most refused to sign the petition unless defendants paid to her \$1,000 for a few feet at the rear of her property which they did not require. The connection between her failure to obtain this fancy price and her active opposition to defendants is not difficult to trace. Defendants were desirous of purchasing from Duchman sufficient land (about ten feet) at the rear of his property to enable their vehicles to pass from the stables premises into their private lane lying alongside the dairy building. Had this been accomplished, the noises from the horses and vehicles in the lane would have been very materially reduced; and perhaps, in so far as these noises constitute a good ground for action, they might have been thus eliminated; but of the latter one cannot on present information speak with certainty. Duchman was under no obligation to sell the small area of land which the defendants required; but, after conferring with his neighbour, Mrs. Most, he was willing to sell at the extravagant price of \$2,000, which defendants, however, would not pay.

"Plaintiffs were aware in 1922 of defendants' assuming retail business and saw its growth from that time and the gradual increase in the number of the vehicles and horses, and they made no serious complaint until a short time before this action was commenced. Duchman, whose dwelling adjoins the lane, raised no objection personally, and his only complaint, made, he says, not by himself but through some member of his family, until about the commencement of this action, was of defendants' employees having broken a board in his fence. During all that time he does not seem to have treated the noises as of much consequence.

"Though the retail business was resumed in 1922 and though it was gradually thereafter enlarged, no serious objection was made until July, 1924, when plaintiffs' solicitors wrote threatening action, but action was not begun until the 31st October of that year. Plaintiffs have been wanting in diligence in seeking a remedy for whatever invasion there has been of their rights, and by their indifference in that respect encouraging defendants in the expansion of their business and consequent expenditure of money and in so altering the conditions thereof. Relief by way



of injunction should not be accorded to such acquiescence and delay as theirs. Damages only, commensurate with the legal wrong, should be the remedy; and, while it is the fact that the defendants have conducted their business with reasonable care, there has been added by the operation of the retail part of the business a new and increased noise and disturbance of so substantial a kind as to constitute a legal nuisance, for which in the circumstances the remedy should be in damages. I have come to this conclusion on a consideration of the whole evidence, and notwithstanding that occupants of the living apartments over the dairy building have sworn that defendants' operations have not caused them disturbance or loss of sleep, and that members of the defendant company gave similar evidence upon the conditions which prevailed prior to 1920."

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As one principal contention of the respondent company rests on the course of devolution of title to the several properties, it becomes necessary to supplement the facts above stated by giving a short historical account of the ownership and occupation of the several parcels of land in question.

In the year 1897 one George H. Guest commenced operating a dairy business on the premises now occupied by the defendants, and from that time until the present, with an interval of five weeks in or about October, 1914, a dairy business has been continuously conducted on the defendants' premises.

In the year 1906 Guest agreed to buy lot 107, and in 1908 it was conveyed to him. In 1911 he bought lots 105 and 106 and thus became owner of all the lands in question now held both by the defendants and the plaintiffs.

On the 26th January, 1912, Guest entered into an agreement to sell to Solomon Reider all the property now occupied by the plaintiffs, being 95 feet in depth of lots 105 and 106 except one foot in width on the east side of lot 106, and this agreement was, on the 12th April, 1912, duly implemented by a conveyance to Reider and his nominees Schwartz and Pastenac from Mary Guest, who had in February, 1912, received from her husband, George H. Guest, a transfer of the dairy undertaking, including the whole block of land (lots 107, 106, and 105).

At that time the buildings on the lands conveyed to Reider *et al.* consisted of three cottages to the west of the dairy premises and beyond these a store at the corner of the public lane. The buildings at present occupied by the plaintiffs appear to have replaced these older buildings in or about the year 1913.

App. Div. In 1897 the dairy business conducted by Guest began with  
1928. two horses and two wagons. By 1911 it had increased so that  
10 wagons, 15 horses, and 17 men were employed, and the out-  
put was between 70 and 80 cans of milk and 8 cans of cream  
per day.  
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Masten, J.A. The dates on which the present plaintiffs acquired their re-  
spective holdings are as follows:—

Solomon Duchman, 3rd January, 1922.

Mary Most, December, 1920.

Nathan Most, April, 1923.

Esther Applebaum, July, 1917.

Izzy Klein, December, 1919.

Abraham Labowitz, March, 1922.

The building marked No. 3 on the plan exhibit 1 was erected by the defendants in 1922, and the garage at the rear of lots 106 and 105 was erected by them in 1923.

These facts do not appear to be seriously in dispute, the questions in appeal being rather as to the legal results which ought to flow from them.

Upon a consideration of all the evidence adduced, coupled with the findings of the trial Judge, I am of opinion that the noise and disturbance made by the employees of the defendant company from 1.30 in the morning is such as materially to interfere with the reasonable comfort of the neighbours in sleeping, and constitutes a nuisance.

In the case of a continuing nuisance by way of noise such as materially to interfere with the ordinary comfort of living, there is difficulty in estimating in money the damage which the plaintiff suffers, nor can it be said that a small money payment affords adequate compensation in such a case. Hence arises the general rule stated by Lindley, L.J., in the *Shelfer* case, cited *infra*, that in cases of continuing actionable nuisance the jurisdiction conferred by Lord Cairns' Act ought only to be exercised under very exceptional circumstances. *Beamish v. Glenn* (1916), 36 O.L.R. 10, affords an example in our own Courts of the application of this rule.

In the course of the argument it was suggested by my brother Riddell that the rule above stated had in this Province been applied less strictly than in England, and that in our Courts greater consideration had been given to the damage which an injunction would cause to the defendant and to the balance of convenience.

That suggestion accorded with my own recollection and experience. App. Div.

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However, on further investigation and consideration, neither on authority in our own Courts nor on principle can I find a basis for such a modification of the English rule. There is no evidence before us that in this respect conditions in Canada so differ from conditions in England as to warrant the adoption of a different rule, and I therefore conclude that *primâ facie* and in the absence of special circumstances of a sufficiently strong character an injunction should be granted.

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As already stated, the appellants' main contention on this appeal is that they are entitled to an injunction and that the trial Judge erred in awarding damages in lieu of an injunction. The first answer of the respondent company to this claim sets up a right by way of easement attaching to the defendants' premises as the dominant tenement and to which the plaintiffs' premises are servient. In other words, that Reider, Schwartz, and Pastenac took the conveyance to them of the lands now occupied by the plaintiffs subject to a right on the part of Guest by way of an implied easement attaching to the lands retained by him to continue the dairy business on those premises; that the plaintiffs are the successors in title of Reider, Schwartz, and Pastenac, and the defendant company is the successor in title to Guest of the dairy premises; and that the benefit and the burden of this implied easement passed down to the parties to this action, and, being an implied easement, is not affected by the Registry Act.

Mr. Rowell contends that this easement extends to and permits the operation of the dairy business as now carried on by the defendants, though that business is greatly expanded over what it was in 1912, and that the easement wholly defeats the plaintiffs' action. I have reached the conclusion that an effective easement binding on the plaintiffs is established, but that the ambit of its operation does not disentitle the plaintiffs from recovering such damages as have been awarded by the trial Judge.

As to the substitution of damages in lieu of an injunction, the leading case in the English Courts is *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, decided by a strong Court of Appeal consisting of Lord Halsbury, Lindley, L.J., and A. L. Smith, L.J. I cannot find that this case has ever been impugned or modified by subsequent decisions; on the contrary, it has uniformly been approved and followed.

- App. Div. The working rule suggested by A. L. Smith, L.J., in that case,  
 1928. has been adopted and applied in cases without number, but,  
 ——— though so well known, I quote it once more. At p. 322 of the  
 DUCHMAN report he says:—  
 v. “In my opinion it may be stated as a good working rule  
 OAKLAND that—  
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 ——— “(1.) If the injury to the plaintiff’s legal rights is small,  
 Masten, J.A. “(2.) And is one which is capable of being estimated in  
 money,  
 “(3.) And is one which can be adequately compensated by  
 a small money payment,  
 “(4.) And the case is one in which it would be oppressive to  
 the defendant to grant an injunction:—  
 “Then damages in substitution for an injunction may be  
 given.”

The provision of our Judicature Act does not differ from the English Act known as Lord Cairns’ Act, which conferred on Courts of Equity a jurisdiction to award damages instead of an injunction. But the rule in the *Shelfer* case does not purport to be exhaustive, and I am not aware of any reported case in the Courts of Ontario, or in the Supreme Court of Canada, in which the limitations enumerated in it have been considered, with a view to modifying or extending them. Not being bound by authority, I think we are at liberty to give effect to the respondents’ contention if on investigation it appears to be well founded even though it does not fall within the rule just quoted. Therefore I proceed to consider some of the authorities cited by Mr. Rowell.

The first case is *Lyttleton Times Co. Ltd. v. Warners Ltd.*, [1907] A.C. 476. Warners sued Lyttleton to restrain it from operating its printing presses and machinery so as to interfere by noise and vibration with the reasonable enjoyment of the plaintiff’s bedrooms. The situation arose in this way. Warners Limited owned a hotel adjoining premises in which the Lyttleton Times Company carried on business as printers, etc. On the representations of an architect (who was relied on by both parties) that the hotel could be provided with additional bedrooms (which were needed), and that the printing house could be accommodated with better premises (which was desired), it was agreed between the plaintiff and the defendant that the printing premises should be rebuilt so that the printing should be carried on in the lower floor and part of the upper floors should consist of bedrooms and be let as such by the printing company



to the hotel. Each party signed an agreement to this effect in the belief that the noise and vibration if not absolutely unfelt in the bedrooms would be so slight as not to be an inconvenience. It turned out otherwise, and the noise and vibration caused substantial interference with sleep in the bedrooms. The New Zealand Court granted to the hotel proprietor an injunction restraining the printing company. This was reversed by the Privy Council on appeal and the action was dismissed. At pp. 481 and 482, Lord Loreburn, Lord Chancellor, says:—

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“When it is a question of what shall be implied from the contract, it is proper to ascertain what in fact was the purpose, or what were the purposes, to which both intended the land to be put, and, having found that, both should be held to all that was implied in this common intention.

.....  
“Mr. Levett and Mr. Pollock argued the case on behalf of the respondents (plaintiffs) as though the common intention was that the plaintiffs should have reasonably quiet bedrooms. It was so, but that was only one-half of the common intention. The other half was that the defendants should keep on printing. One cannot bisect the intention and enforce one-half of it when the effect of so doing would be to frustrate the other half.”

It is to be observed that in this case the action was between the original parties to the contract, and the principle laid down is that the implied obligations in *a contract* must be deduced from and governed by the common intention of the parties. The question of the creation of an easement or quasi-easement does not arise.

The next case is *Jones v. Pritchard*, [1908] 1 Ch. 630. That was a case where two adjoining houses were separated by a party-wall in which were flues used in common to carry away the smoke from the fireplaces in each house pursuant to an agreement to that effect. Each party owned the half of the party-wall adjacent to his own house. There occurred a subsidence of the defendant's house through no default or negligence on his part, with the result that in the common flue there developed a crack which let smoke into the plaintiff's house. The plaintiff was the grantee of the man who originally transferred to the defendant rights in the party-wall and flue. The case was tried by Parker, J., who in the course of his judgment says (pp. 635, 636):—

“The question I have to determine is whether, under these circumstances, the defendant is liable in respect of nuisance. Now if a man grant a divided moiety of an outside wall of his

App. Div. own house, with the intention of making such wall a party-wall  
 1928. between such house and an adjoining house to be built by the gran-  
 DUCHMAN tee, the law will, I think, imply the grant and reservation in favour  
 v. of the grantor and grantee respectively of such easements as may  
 OAKLAND be necessary to carry out what was the common intention of the  
 DAIRY CO. parties with regard to the user of the wall, the nature of these  
 LTD. easements varying with the particular circumstances of each case.  
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.....  
 If authority is wanted for the above propositions, I think it will be found in *Richards v. Rose* (1853), 9 Ex. 218, and the recent case of *Lyttleton Times Co. Ltd. v. Warners Ltd.*, [1907] A.C. 476. The latter case seems to shew that if a grantor is doing, on land retained by him, only what it was at the time of the grant in the contemplation of the parties that he should do, and is guilty of no negligence or want of reasonable care or precaution, he cannot be liable for nuisance entailed upon the grantee."

In the result the plaintiff's action was dismissed. In this case there was a definite grant of one-half of the party-wall with an implied easement giving to the grantee the use of the flues, not only in the part of the wall conveyed, but also in that part of the wall retained by the grantor, and the burden of this easement was held to be assumed by the successor in title of the original grantor.

The next case is *Pwllbach Colliery Co. Ltd. v. Woodman*, [1915] A.C. 634. In that case a butcher brought action against a neighbouring coal mining company, whose screening operations deposited coal-dust on his premises. The colliery company defended on the ground that they were sub-lessees of land leased to a tin plate company with power to that company to carry on on the demised premises *the trades authorised by their memorandum of association*, which included the trade of miners, and that the plaintiff had acquired his premises under a subsequent lease from the same land-owner, expressly providing that the demise was subject to all rights and easements "belonging to any adjoining and neighbouring property."

It was held by the House of Lords that permission to carry on a business does not necessarily imply authority to carry it on in such a manner as to create a nuisance, and the plaintiff was awarded an injunction. In that case consent of the plaintiff to endure the nuisance could not be implied. The case is important however on account of the observations of Lord Parker of Waddington at p. 646, where he says:—

"My Lords, the right claimed is in the nature of an easement, and apart from implied grants of ways of necessity, or of what are called continuous and apparent easements, the cases in which an easement can be granted by implication may be classified under two heads."

And, after referring to the first head, he continues:—

"The second class of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used. See *Jones v. Pritchard*, [1908] 1 Ch. 630, and *Lyttleton Times Co. Ltd. v. Warners Ltd.*, [1907] A.C. 476. But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use."

In *Cory v. Davies*, [1923] 2 Ch. 95, the issue arose between lessees from a common landlord as to an implied easement of egress or ingress over each other's premises by a carriage road laid down by their common lessor as a private right of way. The judgment follows the principles laid down in the cases just noted. It affords a valuable illustration of the facility with which a reservation of an easement may be implied if the circumstances leading to the inference are adequate. The defendant (who was the party repudiating the existence of any easement) was a recent purchaser of his lease from one of the original lessees, and it was held:—

"(3) That, as the defendant's plot was so situated and laid out, when he purchased it, as to put him upon inquiry which must have revealed the existence of the easements of the other lessees over his part of the drive, the defence of a *bonâ fide* purchase for value without notice was not available to the defendant."

The cases of *Hansford v. Jago*, [1921] 1 Ch. 322, *Simpson v. Weber* (1925), 133 L.T.R. 46, and *O'Cedar Ltd. v. Slough Trading Co.*, [1927] 2 K.B. 123, follow the cases I have quoted and afford interesting examples of the application of the principle under discussion to differing sets of circumstances, but contrib-

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ute nothing that supplements or modifies the principle as already stated.

The circumstances which existed in 1912, when the premises now occupied by the plaintiffs were sold and conveyed by Guest to Reider, Schwartz, and Pastenac, plainly raise an implication of a common understanding between the parties that the dairy business was to be continued by Guest on the premises retained by him. Can any one suppose that on the 13th April, 1912, Reider could have obtained against Guest an injunction to stop his dairy business?

But, assuming that there was such a common understanding and implied obligation on the part of the purchaser, there remains the question as to the nature of the right which arises in law.

The defendants claim in virtue of their ownership of the lands on which the dairy business complained of was 'in 1912 and is now carried on.

It is claimed as a right which inheres in their lands, and the real question to be determined is whether the obligation which in 1912 admittedly bound the plaintiffs' predecessors in title constitutes an easement whereby the owner for the time being of defendants' lands is entitled to carry on a dairy business there in the usual way, or whether such obligation of the purchaser in 1912 was in the nature of a covenant not to object to the dairy business carried on, on the defendants' lands.

It seems to me that an easement is constituted. The lands affected by the obligation are completely defined. The dominant tenement is the land retained by Guest and now owned and occupied by the defendant company. The servient tenements consist of the several parcels now owned and occupied by the several plaintiffs, being the lands sold by Guest to Reider and others. The obligation in its nature was not personal merely to Guest, the vendor, but was for the benefit of the dairy business which had been there carried on since 1895.

The right is, as it seems to me, a positive right reserved as against the purchasers in 1912 by the vendor Guest, enabling him and his assigns to carry on his dairy business with its accompanying noise and in so doing to create, emit, and propel over the plaintiffs' lands the sound waves which his operations normally create. That seems to me to be the true character of the implication rather than to describe it as in the nature of an obligation of the purchaser not to object to the dairy business as then carried on. An easement of receiving light is well recognised,



then why not an easement of emitting sounds? It appears to me that nothing stands in the way of creating such an easement by express grant, and if such an easement can be created by express grant it can also be implied, provided the circumstances are such as to warrant the implication. On the principle of the cases to which I have referred, it appears to me that the right which Guest retained was an easement attached to the land retained by him, and, being an implied easement, it does not fall within the provisions of the Registry Act.

I refer to *Israel v. Leith* (1890), 20 O.R. 361, approved in this Court in *Myers v. Johnston* (1922), 52 O.L.R. 658, at p. 664.

If it is considered that such a conclusion interfered in any way that is undesirable with the general policy of the Registry Act, that is a matter which can only be remedied by the Legislature; being beyond the powers of the Court, which can only interpret and administer the law as it stands.

I observe further that when the present plaintiffs severally acquired their holdings the dairy business was in full operation on the adjoining lands, and I agree with the reasoning of P. O. Lawrence, J., in *Cory v. Davies* (*supra*) that the plaintiffs cannot avail themselves of the claim that they are *bonâ fide* purchasers for value without notice.

I am unable to say that the finding of the trial Judge is wrong where he deals with the nature and extent of the recent increases in the defendants' operations as originating a distinct cause of action. While his finding in that regard is directed to the question whether the defendants had exceeded<sup>7</sup> the limits covered by the plaintiffs' prior acquiescence and laches, I think that finding is also applicable to establish that the defendants' acts had exceeded the limits permitted by the easement; and that, while the quality and nature of the dairy business now carried on does not differ from that carried on in 1912, yet the quantity or volume of that business is such as to transcend to some extent that which the defendants' easement allows. I understand that it is in respect only of such excess that the trial Judge has awarded damages, and I am unable to say that, in finding as a matter of fact that such extension of operations gave rise to a new cause of action, he was wrong.

The extension of operations in excess of the easement is not trivial in the case of Duchman, and I would allow his appeal to the extent of granting him an injunction prohibiting the defendants from conducting their business in such a way as to create any disturbance in excess of that customarily created by their

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predecessors in title on or prior to the 26th January, 1912 (the date when the easement arose).

The damage to Most and Klein is so trivial that in their cases no injunction should be granted.

Mr. Rowell's second ground of defence was based on the acquiescence and laches of the plaintiffs. On that question I agree with the findings of the trial Judge, in so far as they relate to the plaintiffs Duchman, Most, and Klein. But the act of Applebaum and Labowitz in signing the petition to the municipal council for the erection of the garage and livery stable, and the fact found against them that they were fully apprised of the defendants' plans, evidence such an acquiescence as in my opinion precludes them from any recovery whatever.

Before parting with the case, I ought perhaps to refer to one other point relied on by Mr. Shaver, viz., the entire cessation of operation of this dairy business for a short period and of the retail branch of the business for a much longer period.

This could only affect the easement above referred to if it evidenced an abandonment of the defendants' right, and in such a case the material inquiry is always whether there was an intention to abandon the right. There is here no evidence of such an intention.

For these reasons I would allow the cross-appeal of the defendants as against Applebaum and Labowitz and as against them dismiss the action without costs here or below; as against the other plaintiffs the cross-appeal of the defendants should be dismissed with costs; and the appeal of Duchman should be allowed to the extent and in the manner above indicated, with costs.

RIDDELL, J.A.:—In this appeal from the judgment at the trial of Mr. Justice Kelly, and cross-appeal by the defendants, the position taken at the hearing by counsel removes the only difficulty I felt in the matter.

I accede to the argument of Mr. Rowell that, by reason of the circumstances, there was established a quasi-easement over the lands of the plaintiffs—this, I think, is clear from such cases as *Lyttleton Times Co. Ltd. v. Warners Limited*, [1907] A.C. 476. I also agree that the doctrine that such interests do not come within the provisions of the Registry Act, however questionable it would be were it of first instance, is too firmly embedded in our law to permit the Court to disregard it; on the authority of the cases mentioned in *Armour on Titles*, 4th ed., p. 96, this principle has been accepted by the public as the basis

of their transactions for a considerable length of time, and consequently the Court should leave it to the Legislature to declare or amend the law: Broom's Legal Maxims, 9th ed., pp. 98, 100, 105. The maxim "*Communis error facit jus*" is peculiarly applicable to conveyancing: *Caldwell v. McLaren* (1884), 9 App. Cas. 392, at p. 409; and it should be applied here.

But I am convinced that the defendants have been committing acts not within their easement, and have been guilty of actionable wrong towards the plaintiffs; and consequently that an action lies.

My difficulty was that, notwithstanding that our Courts have apparently been more liberal in applying Lord Cairns' Act than the Courts of England, I cannot bring myself to think that the right to an injunction was not to be enforced—and, moreover, I cannot think that, if damages were to be given in lieu of an injunction, the amount awarded was at all adequate—that damages awarded in lieu of an injunction are damages for all time, is, I think, clear law. But counsel for the defendants agreed before us that the damages should be considered as damages only to the time of assessment; consequently, we should look upon this case as a common law action for damages only. In that view, the damages are not so inadequate, and the judgment may be allowed to stand in that sense. This will enable the plaintiffs, if so advised, to bring another action or actions, and will not preclude the Court in any of these actions from granting an injunction as under the old practice.

As to the costs, I should have been better satisfied had the plaintiffs been awarded their costs, at least in part; but, as we should not interfere with the judgment so far as the damages are concerned, we should not interfere with the Court below as to costs.

In this Court, the cross-appeal was not simply a shield to defend the judgment as it stood, but a sword to enforce what were claimed to be the rights of the defendants overlooked or disregarded by the trial Judge; it was a substantial part of the proceedings. The cross-appeal to set aside the judgment failing, it might be dismissed with costs; the appeal failing might also be dismissed with costs; justice will be done by awarding no costs to either party in this Court.

This disposition of the case will enable the parties to get together and arrange a reasonable settlement of the matters in dispute between them. There seems to be no reason why the business of the defendants cannot be carried on without unreason-

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able disturbance of these plaintiffs by the expenditure of a comparatively small sum, and it is to be hoped that both parties will act reasonably, so as to avoid the continuation of this irritating litigation.

The above refers to all the plaintiffs but Applebaum and Labowitz; their action in assisting the defendants to put themselves in the position to commit what would otherwise be a nuisance precludes them from complaining—their action should be dismissed with costs here and below.

It will be seen that in view of the position taken by both counsel, I propose to treat this as a common law action for damages up to trial, leaving it open to the successful plaintiffs to bring another action for future damages, if the nuisance is not abated.

MIDDLETON, J.A.:—I have had the privilege of reading the judgments of my brothers Riddell and Masten, and, as I find myself out of harmony with some things said by them, I think it better that I should express my own views as to the grounds on which the decision of the Court should rest.

Provisions are implied in every contract from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that in all events it should have. This principle is very clearly stated by Lord Justice Bowen in *The Moorcock* (1889), 14 P.D. 64, at p. 68, and the same thing has been repeated in many familiar cases. The circumstances surrounding the contract are to be looked at to aid in the solution of the problem presented.

*Lyttleton Times Co. Ltd. v. Warners Ltd.*, [1907] A.C. 476, is an authoritative application of this familiar principle to a situation not unlike that now presented. "When it is a question of what shall be implied from the contract, it is proper to ascertain what in fact was the purpose, or what were the purposes, to which both intended the land to be put, and, having found that, both should be held to all that was implied in this common intention. . . . Both parties agreed upon a building scheme. . . . Both parties believed these two uses could co-exist without clashing, and that was why both of them accepted the scheme. Neither would have embarked upon it if he had not thought his intended enjoyment of the building would be permitted, and both intended that the other should enjoy the building in the way contemplated. They were mistaken in anticipation. But if it be true that neither has done or asks to do anything which was not con-



templated by both, neither can have any right against the other" (p. 481). App. Div.  
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This case does not discuss the nature of the right or immunity of the parties and rests entirely upon the implied contract. The head-note states the principle tersely: "Implied obligations in a contract must be governed by the common intention of the parties." DUCHMAN  
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In the following year, *Jones v. Pritchard*, [1908] 1 Ch. 630, was decided. That is a case in which it was sought to imply reciprocal grants and reservations for the passage of smoke through flues in a party-wall, and the principle of the *Lyttleton* case was applied. There was nothing to indicate that the right recognised by the *Lyttleton* case was an easement, or in the nature of an easement, but the thing in question in *Jones v. Pritchard* was plainly an easement and was so described in the course of the discussion. Middleton,  
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This is followed by the decision in *Pwllbach Colliery Co. Ltd. v. Woodman*, [1915] A.C. 634, reported in the Court of Appeal, *sub nom. Woodman v. Pwllbach Colliery Co. Ltd.* (1914), 111 L.T.R. 169. There a lease by a common landlord to the colliery company was followed by a lease of another part of the same holdings to a butcher. The colliery discharged so much coal-dust over the butcher-shop as seriously to interfere with the manufacture of sausage—"a nuisance, an intolerable nuisance" was found to exist, but the trial Judge refused relief because under the first lease there was in his view an implied grant of the right to make and scatter coal-dust, and the butcher took subject to this. In appeal the alleged right was said not to be an easement at all, and the right recognised in the *Lyttleton* case is defined in words quoted from it as an obligation not "to frustrate the purpose for which, in the contemplation of both parties, the land was hired." Therefore the defendants would have to make out that to restrain the carrying on of the business as a nuisance would frustrate the object for which the land was leased, namely, the carrying on of the business of mining upon it, and, the defendants having failed in this, the appeal was allowed. In the Lords this was affirmed.

The case is however dealt with without anything being said to indicate that the right claimed to commit a nuisance is an easement. Indeed the contrary is indicated: e.g., Lord Loreburn, speaking of the obligation of the colliery company to its neighbours, says ([1915] A.C. at p. 638): "Their duty to their neighbour is not merely to take care so as to avoid causing

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a nuisance. Their duty is to abstain from causing one at all, unless, of course, they have a right to cause one, as, for example, by statute or by consent of the complaining party or of some one else whose consent binds him. Such consent may be proved like any other question of fact. It may appear from the conduct of the parties and the surrounding circumstances, as in *Hall v. Lund* (1863), 1 H. & C. 676, or as in *Lyttleton Times Co. Ltd. v. Warners Ltd.*, where both parties agreed that the very thing which was done should be done, though neither of them expected that it would cause a nuisance."

Lord Parker, at p. 646, says, "The right claimed is in the nature of an easement," and that from the circumstances surrounding the grant "the law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or the land retained by the grantor is to be used."

Lord Parmoor, at p. 653, adopts the language of Pickford, L.J., and speaks of "an obligation not to frustrate the purpose for which, in the contemplation of both parties, the land was hired," and adds: "In my opinion it is not material to decide whether an easement has been created over the land . . . since if, on the construction of the lease, a right—other than an easement—has been given to carry on the mining business so as to create a nuisance, the lessor could not by a subsequent lease have derogated from his previous grant."

Without further examination of these cases, I am ready to assume that they establish that when the owner of the dairy sold a portion of his holding for the purpose of having residences erected upon it, there was an implied undertaking or obligation on the part of the purchasers of the building lots not to object to the user by the vendor of the land which he had retained for the purpose of carrying on a dairy business: and a purchaser must therefore put up with such noise as is a reasonable necessity in the conduct of that business, but he is not bound to submit to any noises or disturbances going beyond this requirement. So far I am in substantial accord with the views expressed by my brother Masten, but I differ entirely from him in that I think the right of the vendor to continue his dairy business, even though this involves committing a nuisance, does not rest upon an implied easement. I think it rests entirely upon an implied covenant or obligation on the part of the grantee not to complain of that

which it was the common understanding of both parties should be done and carried on after the making of the grant.

The precise nature of the right or immunity is of importance and is not a mere matter of terminology, for if the right is an easement it is not an easement which requires to be registered for its preservation. It is in the nature of a legal interest arising by virtue of an implied grant, and so it is entirely outside the Registry Act, and is not subject to its provisions. See *Israel v. Leith*, 20 O.R. 361. Whereas, if the right is, as I think it is, an equitable right based upon an implied negative obligation on the part of the purchaser, it is within the provisions of the Registry Act (sec. 72 of the present Act, R.S.O. 1927, ch. 155), and so is void as against a registered instrument executed by the same party. The original grantee would still be bound, but he sold to Duchman in 1922, and Duchman took by registered conveyance without actual notice.

In none of the cases that I have referred to is this question really discussed, for the point was not material for their decision. In them the question at issue was the existence and extent of the right—its exact nature whether “easement” or “obligation” was a matter of no moment.

I would however refer particularly to the decision in *Browne v. Flower*, [1911] 1 Ch. 219, a decision of Mr. Justice Parker, as he then was, which has the sanction and approval of the Court of Appeal in *Harmer v. Jumbil (Nigeria) Tin Acres Ltd.*, [1921] 1 Ch. 200. I regard this decision as of particular importance, because I cannot believe that when Lord Parker spoke as he did in 1915 in the passage I have quoted, he had forgotten, or intended in any way to depart from, that which he had said some five years earlier, nor do I think the Court of Appeal would have so unqualifiedly adopted his utterances in 1920 if that Court thought that the decision in the Lords had in any way diminished their authority.

*Browne v. Flower* was a case of leases of flats in a large building. There was subsequently erected an outside staircase giving access to a subdivision of a flat leased. This was objected to on the ground that persons using the staircase could see into other flats, and this annoyed the inmates. The argument for the plaintiffs, who sought an injunction, was, in the first place, that what was done was a breach of an agreement to be implied not to do anything on the premises let which might become or be a nuisance to the occupants of the demised flats, and, secondly, that what was done was a derogation from the grant made when the

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earlier leases were executed. It was answered that the law "does not recognise any easement of prospect or privacy." To this Parker, J., says (pp. 225, 226): "But the implications usually explained by the maxim that no one can derogate from his own grant do not stop short with easements. Under certain circumstances there will be implied on the part of the grantor or lessor obligations which restrict the user of the land retained by him further than can be explained by the implication of any easement known to the law. Thus, if the grant or demise be made for a particular purpose, the grantor or lessor comes under an obligation not to use the land retained by him in such a way as to render the land granted or demised unfit or materially less fit for the particular purpose for which the grant or demise was made . . . . In the case of *Grosvenor Hotel Co. v. Hamilton*, [1894] 2 Q.B. 836, the lessee was held entitled to prevent the lessor from using property retained by him in such a way as to cause on the demised property vibrations which did not amount to a legal nuisance, though there is no such easement known to the law as an easement of freedom from vibration any more than there is an easement of freedom from noise. Once again, though possibly there may not be known to the law any easement of light for special purposes, still the lease of a building to be used for a special purpose requiring an extraordinary amount of light might well be held to preclude the grantor from diminishing the light passing to the grantee's windows, even in cases where the diminution would not be such as to cause a nuisance within the meaning of the recent decisions . . . . In none of these cases would any easement be created, but the obligation implied on the part of the lessor or grantor would be analogous to that which arises from a restrictive covenant."

In Gale on Easements, 10th ed., p. 2, the distinction is clearly recognised: "An easement differs from an obligation, inasmuch as it gives a right over the land of another; while an obligation gives a right only against the owner. In connection with this rule, it may be pointed out that where land is granted or demised for certain purposes, there, although no easement is created, an obligation may be implied on the part of the grantor or lessor which is analogous to that which arises from a restrictive covenant."

For these reasons I am, as I have said, of opinion that the implied obligation arising on the sale of the land for building sites was in the nature of a covenant on the part of the purchaser not to object to the contemplated user of the remaining



lands by the vendor, and, that being so, I think Duchman is entitled by reason of his registered conveyance to complain not merely of the excessive user beyond that contemplated, but of the entire nuisance caused by the carrying on of the business.

At the hearing of the case Mr. Justice Kelly assessed the damages sustained by Duchman at \$400. There is nothing in his judgment to indicate the basis upon which the assessment was made. Upon the argument of the appeal it was agreed that this amount was not by way of compensation so as to cover any future damage sustained by reason of the continuance of the nuisance. I am inclined to think that the damages were assessed by Mr. Justice Kelly upon the basis that Duchman was entitled to full compensation down to the date of the judgment for all the damage that he has sustained by reason of the nuisance created.

That being so, it is necessary to consider the defendants' appeal upon the merits. I think that the business as conducted does constitute an actionable nuisance, and I can see no reason why the defendants should not so modify their existing buildings as to allow the loading and unloading of the milk, both when received in cans from the farmers and when shipped bottled for the use of the consumers, to be carried on in some other place than in this narrow lane, almost beside the wall of the plaintiff Duchman's dwelling. What is done in this lane is certainly not merely the use of the lane as a right of way, it is the use of it as a loading yard, and it is this latter use that constitutes the real ground of complaint. I think the damages have been assessed at an exceedingly modest sum. This, no doubt, is the result of the very exaggerated claim put forward by the plaintiffs. There is however no appeal by the plaintiffs in which the amount of damages is sought to be increased.

The defendants' appeal as to Duchman, I think, fails. As to the plaintiffs Applebaum and Labowitz, I agree with my brother Masten that they assented to the erection of the buildings in question and so cannot now object, and as to them the defendants' appeal should be allowed.

The plaintiffs appeal upon the ground that, at any rate so far as Duchman is concerned, substantial injury and damage have been proved, and that therefore, while he is entitled to damages for things past, he is entitled to relief by way of injunction with respect to the future. I cannot understand how this demand is met by Mr. Rowell's admission that the damages awarded are damages down to the date of the trial only. This, it seems to me, cannot preclude the plaintiff from obtaining an injunction as to

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the future if he is otherwise entitled to it, neither can I understand how the difficulty in ascertaining how far what is now being done exceeds that which was contemplated as at the date of the original conveyance is an answer to this claim. The amount of the excess ought to be ascertained in order to assess damages if it is true that the plaintiffs' right to damages is limited as suggested. I am however free from any embarrassment on the latter head, as, in my opinion, Duchman, by reason of the Registry Act, is entitled to complain of the nuisance irrespective of any implied obligation on the part of his grantor to refrain from complaining.

The case of *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, is, I think, not only a binding authority, but one which we should unhesitatingly follow. It has never been questioned in England or here, and, if regard is paid to this decision, then the plaintiff Duchman is entitled to the injunction claimed. The injury to his legal right is not small, it is not capable of being estimated in money, and money would not be an adequate compensation, particularly money which can be described as a small money payment. A noise which during the early morning hours prevents the plaintiff from sleeping in comfort and peace is not a trivial thing. Under the judgment as it now stands this is recognised, but the plaintiff has no injunction, nor has he the damages which under Lord Cairns' Act he is entitled to in lieu of an injunction. See *Arthur v. Grand Trunk Railway Co.* (1895), 22 A.R. 89.

It has been suggested that our Courts are more free than the English Courts in substituting damages for an injunction. I do not agree with this proposition. Both in England and in this country there was a period of time in which the Courts had no settled policy as to the application of the Act in question. Each Judge did that which was right in his own eyes without recognising any guiding principle, but as the law came to be settled, the principle crystallised in the *Shelfer* case gradually emerged, and this has been accepted everywhere as a sound guiding principle, and I think it should not be departed from.

With reference to the plaintiffs other than Duchman, Applebaum, and Labowitz, as to whom the action is dismissed, the damage proved is so trifling that I agree that the case comes within the *Shelfer* case and an injunction ought not to be awarded as to them. Duchman alone has sustained any real injury or inconvenience.

I would therefore allow Duchman's appeal and grant him the injunction sought. App. Div.  
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With reference to costs the situation is not easy. Much of the expense of the trial was occasioned by the exaggerated claims put forward. I think in the result justice will be attained by giving Duchman half his costs of the action and of the appeals; otherwise no costs. DUCHMAN  
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ORDE, J.A.:—I concur in the judgment of my brother Middleton.

*Plaintiff's appeal allowed in part.*

[APPELLATE DIVISION.]

STARK v. BATCHELOR.

1928.

Oct. 19.

*Costs — Action and Counterclaim — Negligence — Collision of Motor-vehicles—Apportionment of Damages—Set-off—Contributory Negligence Act, R.S.O. 1927, ch. 103—Disposition of Costs—County Court Action—Scale of Costs—Costs of Appeal.*

A collision between the motor-vehicles of the plaintiff and defendant having occurred upon a highway, and both vehicles having been injured, the plaintiff sued in a County Court for damages for the defendant's negligence and the defendant counterclaimed for damages for the plaintiff's negligence. The trial Judge found that both parties were negligent. He assessed the plaintiff's damages at \$272, but found that by reason of the plaintiff's negligence he was entitled to \$136 only. The trial Judge found the total amount of damages to which the defendant would have been entitled but for his own negligence to be \$104, but that, by reason of his (the defendant's) negligence, he was entitled to receive from the plaintiff only \$52. Upon these findings judgment was entered for the plaintiff for \$84 and "costs on the appropriate scale" and for the plaintiff for "his costs on the County Court scale as between solicitor and client, to be set off against the amount found due to the plaintiff:"—

*Held*, upon appeal by the plaintiff, that the costs should have been awarded on the footing of an action and a counterclaim, and the plaintiff, succeeding in recovering \$136, ought to receive from the defendant party and party costs on the County Court scale; the defendant, succeeding in recovering on his counterclaim \$52, should receive from the plaintiff party and party costs on the County Court scale; and the plaintiff should receive half the costs of his appeal from the defendant.

The two amounts of damages might be set off *pro tanto*, but this should have no effect upon the costs.

The provisions of the Contributory Negligence Act, R.S.O. 1927, ch. 103, construed.

The defendant's counterclaim being in the County Court, into which he was brought by the plaintiff, the defendant's costs should be on the County Court scale.

1928. *Foster v. Viegel* (1889), 13 P. R. 133, followed.  
STARK The trial Judge did not deal with the costs as a matter of judicial  
v. discretion but made them follow the result of his judgment; and  
BACHELOR. so the appellate court was not hampered in deciding according to  
strict law.

AN appeal by the plaintiff from the judgment of the County Court of the County of York in an action for damages for injury to the plaintiff's motor-vehicle in a collision with the defendant's motor-vehicle upon a highway; and a counterclaim by the defendant for damages for injury to his vehicle in the same collision. By the judgment both parties were found to have been negligent, and an apportionment of the damages was made, the result being that the plaintiff was awarded \$84 with costs on the appropriate scale and the defendant was allowed to set off his costs on the County Court scale as between solicitor and client.

September 20. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, JJ.A.

*F. J. Hughes*, K.C., for the appellant, argued against the finding that he was negligent. [THE COURT was of opinion that the appeal on that ground failed.] Counsel then contended that the learned County Court Judge erred in giving judgment for the plaintiff for the difference between the amount awarded him on his claim and the amount awarded the defendant on his counterclaim. The effect of such a judgment is to give the plaintiff costs on the Division Court scale only, with a set-off in favour of the defendant. The judgment should have been for the plaintiff for one-half of his claim (\$316) and costs and for the defendant for one-half of his counterclaim (\$52) and costs with a set-off. The learned County Court Judge erred in principle in deducting \$52 from \$136 before awarding costs. Reference to the County Courts Act, R.S.O. 1927, ch. 91, sec. 37, subsec. 1 (c); *Morrison v. Morrison* (1928), 62 O.L.R. 178.

*J. E. Lawson*, for the defendant, respondent, contended that, the learned trial Judge having found that the plaintiff was entitled in the result to \$84, was right in giving judgment for such an amount with costs, which follow the event. Reference to Rule 649; *Ireland v. Pitcher* (1886), 11 P.R. 403. The Contributory Negligence Act, R.S.O. 1927, ch. 103, is specific in directing that the trial Judge shall find (a) the entire amount of damages to which the plaintiff is entitled (sec. 2); (b) the entire amount of damages to which the defendant is entitled (sec. 1); (c) the degree in which each party was in fault. Having deter-



mined these three factors, he is required to apportion the damages, so that in the result the plaintiff shall have judgment only for so much thereof as is apportioned to the degree of fault imputable to the defendant. The statute having so expressly stated, no other method of apportionment is open to the trial Judge.

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October 19. RIDDELL, J.A.:—In this case two automobiles collided, the owners being properly held equally negligent; the damage to the plaintiff has been fixed at \$272 in all, but, by reason of his negligence, the amount he is entitled to receive for his claim is \$136. On the action being brought, the defendant did not content himself with contesting the plaintiff's claim; but he counterclaimed for damages for himself. The trial Judge has found the total amount of damages to which the defendant would have been entitled, but for his own negligence, to be \$104; but, by reason of his negligence, he is entitled to receive from the plaintiff only \$52. Then, the learned County Court Judge gives judgment for the plaintiff for the difference, \$84 and costs.

On the judgment being settled by the clerk, it took the following form:—

"2. This Court doth order and adjudge that the plaintiff do recover from the defendant the sum of \$84 and costs on the appropriate scale to be taxed.

"3. And it is further ordered that the defendant do recover from the plaintiff his costs on the County Court scale as between solicitor and client, to be set off against the amount found due to the plaintiff under the preceding paragraph hereof."

The Contributory Negligence Act, R.S.O. 1927, ch. 103, is appealed to; it reads:—

"1. In this Act 'plaintiff' shall include a defendant counterclaiming, and 'defendant' shall include a plaintiff against whom a counterclaim is brought.

"2. In any action or counterclaim for damages, which is founded upon fault or negligence, if a plea of contributory fault or negligence shall be found to have been established, the jury, or the judge in an action tried without a jury, shall find:—

"First: The entire amount of damages to which the plaintiff would have been entitled had there been no such contributory fault or neglect;

"Secondly: The degree in which each party was in fault and the manner in which the amount of damages found should be apportioned so that the plaintiff shall have judgment only for

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so much thereof as is proportionate to the degree of fault imputable to the defendant.

"3. Where the judge or jury finds that it is not, upon the evidence, practicable to determine the respective degrees of fault the defendant shall be liable for one-half the damages sustained."

Remembering that it has always been considered that a counterclaim is a separate action, it seems to me that sec. 1 is simply *ex abundanti cautela*: it, in effect, says that the real plaintiff in a counterclaim is to have precisely the same rights as though he had set up his claim, as he might, in a separate action.

Coming to the matter of the damages, it is provided that the trial tribunal shall "find . . . the entire amount of damages to which the plaintiff would have been entitled" but for the negligence on his part. This I take to be "the amount of damages found," mentioned in the next clause. The effect of this clause (in the present case) is to halve the amount for which the plaintiff is to have judgment.

Consequently, had there been no counterclaim and the defendant had availed himself, as he might, of the negligence of the plaintiff simply as a defence to the action, either in whole or as to the amount of damages to be awarded, the plaintiff would have been entitled to judgment for \$136 and costs on the County Court scale. I can find nothing in the Act to reduce this right, and no reason for limiting him to Division Court costs.

Then the defendant in his action, he being plaintiff in that action, would, but for his negligence, be entitled to judgment for \$104; but, by reason of his negligence, his amount is reduced by the statute to \$52; and consequently he should have judgment for \$52 and costs on the County Court scale—this on the ground that his counterclaim is in the County Court, as has been established by such cases as *Foster v. Viegel* (1889), 13 P.R. 133—a practice which we should not disturb.

There is no objection to the set-off *pro tanto* of the defendant's damages against those of the plaintiff; but this should have no effect on the costs.

The judgment should be set aside and the proper judgment entered in accordance with the law; the plaintiff had to come to this Court for relief from an improper judgment; he fails, however, as to the merits; and I think justice will be done by allowing him half the costs of this appeal.

It may well be to state in somewhat different form in my view as to the import of the statute.

When an action is brought such as this, the defendant, if he desires to take advantage of what he considers is negligence contributing to the casualty, on the part of the plaintiff himself, is not compelled to set up, by way of counterclaim or otherwise, any damage which he, the defendant, may have suffered; he may simply plead (and prove if he can) that the negligence of the plaintiff either caused or contributed to causing the casualty: if he prove this, the plaintiff will recover nothing or only a part of the damages he suffered—the “contributory negligence” of the plaintiff is a defence in whole or *pro tanto*. And, in this case, the damage to the defendant is not even an element to be considered—evidence as to the damage to the defendant could be admitted, if at all, only as indicating the plaintiff’s negligence. The judgment in this case is obvious.

The defendant may wish to obtain redress for damages which he has suffered in the casualty; there are two courses open to him; he may prefer to bring a separate action; and this will often be the prudent course. There may be personal injury of which the full result, perhaps serious, is not yet manifest; and it may be wise to await developments, remembering that damages are assessed once for all, and a new action cannot be brought if and when a new complication sets in. There is no difficulty in finding the proper judgment in this case.

A third course is open to the defendant: he may counterclaim. This is a sort of combination of the other courses; each part is a separate action and is tried on its own merits; and each party is to receive the same relief as though each had sued separately. I can find nothing in the statute, and nothing in principle, so much as suggesting that a different rule should be applied; there may, indeed, be a “set-off,” as it is conveniently called, of one judgment against the other, wholly or *pro tanto*; but this should not have any effect on the costs; each party should have the costs to which he would be entitled, had he sued separately, subject to the incidental advantage which a defendant may have in view of the rule laid down in our Courts, that a “plaintiff by counterclaim” is to be entitled to costs on the scale of the Court in which the action is brought, no matter how small his own recovery. I do not say or suggest that in no case should this rule be departed from; but, if any such case can arise, it is not this case.

The only ground that can be urged, outside of judicial discretion, is that this plaintiff is bound at his peril as to costs to see to it that he brings his action in the proper court; but here it cannot be held that the plaintiff should have known that the de-

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App. Div.    defendant would proceed by way of counterclaim, and that he should  
1928.        have moulded his pleading and selected his court accordingly. I  
STARK       am of the opinion that it is enough that the plaintiff, in selecting  
v.           his court, take into consideration the amount to which he will be  
BACHELOR.   declared by judgment to be entitled to receive from the defendant;  
Riddell, J.A. and that he need not contemplate the chance of the defendant  
claiming damages from him, and thereby reducing the amount  
which he actually receives or is to receive.

It may be noticed that para. 3 of the judgment would make the plaintiff pay the ordinary party and party costs on the County Court scale of the whole action: the excess of solicitor and client over party and party costs—*crede experto*—will almost certainly be as much as or more than the Division Court costs which the plaintiff is to receive.

The great hardship—to use no stronger term—of compelling him to pay the costs of an action, in which he succeeds to a much greater extent than his opponent, is obvious, and would induce the Court to decline to exercise a discretion against his strict legal claims. But I think that this case can and should be decided upon the strict law, and the parties receive the relief to which the strict law entitles them.

ORDE, J.A.:—We were all agreed at the hearing that the finding of the learned trial Judge that both parties were guilty of negligence was right and that the appeal therefrom must fail.

The only remaining point was as to the effect of the form of the judgment upon the question of costs, having regard to the provisions of the Contributory Negligence Act, R.S.O. 1927, ch. 103.

The formal judgment awards the plaintiff \$84 damages “and costs on the appropriate scale to be taxed;” and gives the defendant “his costs on the County Court scale as between solicitor and client, to be set off against the amount found due to the plaintiff.”

The learned trial Judge arrived at the amount awarded the plaintiff by combining the loss sustained by each party and then (both being equally at fault) dividing the total amount in half; the plaintiff's damages exceeding that amount by \$84, he was given judgment accordingly.

Now, while this method of calculating the damages must necessarily arrive at the exact amount due by one party to the other, it is not, in my opinion, the method contemplated by the Contributory Negligence Act. In effect the learned trial Judge



has dealt with the counterclaim as if it were a set-off. But nothing in the Act, either expressly or by implication, entitles a defendant who pleads contributory negligence to have his damages deducted from the amount found due the plaintiff. All that he can accomplish by his defence is to reduce the amount of the plaintiff's damages proportionately to the degree of the plaintiff's contributory negligence. The defendant may have suffered no damages whatever or if he has he may prefer not to claim them. But, if he wishes to enforce his claim either with a view to recovering any balance that may be due him or to further reducing the amount to be apportioned the plaintiff, he must counterclaim for them.

The provisions of sec. 2 as to the apportioning of the damages when contributory negligence is established are upon a first reading a little confusing. It was argued that "the amount of damages found" means the combined amount suffered by both parties and that the word "apportioned" means "apportioned as between the parties." But the "amount of damages found" refers to the amount in the earlier paragraph "to which the plaintiff would have been entitled had there been no such contributory fault or neglect," and the apportionment is not as between the parties, but is of the amount so found according to "the degree in which each party was in fault," and the amount so found is reduced accordingly.

The Act is not designed for the protection of defendants. It is intended to give a plaintiff, guilty of contributory negligence, some relief where formerly his action would have been dismissed. It entitles him to recover his damages, but to the extent to which he was to blame he must suffer the loss himself.

Instead of giving any rights to a defendant, the Act has cut down the complete defence formerly available to him and has made him liable for a proportionate part of the plaintiff's damages. If a defendant has also suffered damage, then he can also get the benefit of the Act, but only by counterclaiming, and thereby becoming a "plaintiff" as defined by the Act.

It follows from this, that where, as here, the defendant also counterclaims for damages, the proper method of calculating the damages is not to combine them and then divide the total, but to apportion the whole amount of each party's damages according to the degree of fault. The net result is the same, but, while, according to our practice, the trial Judge may set off one amount against the other and give judgment for the balance, this is merely the result of his adjudication upon two independent causes

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App. Div. of action, and must not be confused with a judgment upon a  
1928. plea of set-off.

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It is well settled that, whatever form the judgment may take, the costs ought to be awarded upon the footing of an action and a counterclaim. This does not mean, of course, that the trial Judge may not exercise his discretion as to the costs just as fully as in all other cases. But it is clear that the learned trial Judge did not deal with the costs here as a matter of discretion but allowed them to follow the event. Had his discretion been exercised here upon a proper footing, namely, that of an adjudication upon two independent causes of action, we might hesitate to interfere, notwithstanding our power to do so: *Morrison v. Morrison*, 62 O.L.R. 178. Many cases may be suggested where the discretionary power would be rightfully exercised to reduce the costs of a successful party or to deprive him of them altogether. In cases where the degree of fault is not equally divided, that of one party being much greater than that of the other, or where the damages sustained by one are greatly in excess of those of the other, justice may require a corresponding adjustment of the costs so that the party who succeeds in substance may not be robbed of the fruits of his victory.

In the present case the plaintiff succeeds as to one half of \$272, namely \$136, and he ought in my judgment to get his party and party costs from the defendant upon the County Court scale. The defendant succeeds on his counterclaim as to one-half of \$104, namely \$52. That amount is within the jurisdiction of the Division Court, but the defendant was nevertheless entitled by reason of the plaintiff's action to counterclaim in the County Court, and he ought therefore to get his party and party costs from the plaintiff on the County Court scale.

I agree that the plaintiff should get half his costs of this appeal.

LATCHFORD, C.J., and MIDDLETON and MASTEN, JJ.A., agreed with ORDE, J.A.

*Appeal allowed in part.*

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## [APPELLATE DIVISION.]

VAN GEEL v. WARRINGTON.

1928.

Oct. 19.

*Bailment—Motor-car Entrusted to Keeper of Service Station for Specific Purpose—Injury to Car when being Driven by Servant of Bailee—Servant Using Car for his own Unauthorised Purposes—Breach of Master's Contract—Failure of Servant to Perform Duty—Liability—Negligence in Employing Unfit Person—Servant's Theft of Car—Liability of Bailee to Bailor.*

The plaintiff, a customer of the defendant, left his motor-car at the defendant's service station to be supplied with gas and oil and washed. There were no facilities at the station for washing the car, and the defendant's servant, as was his duty, took out the car to drive it to a garage to be washed. On the way to the garage the servant changed his mind and drove the car in another direction "upon a frolic of his own." In doing so he ran the car into a telephone pole and damaged the car:—

*Held*, that the defendant, as master, was liable in damages for the wrongful act of his servant.

A master is liable for the conduct of his servant whom he selects and puts in his place to discharge the duty he has undertaken, and this law is applicable in a case of bailment. The conduct of the servant is then the conduct of the master, and the master is liable to the bailor.

*Lloyd v. Grace Smith & Co.*, [1912] A.C. 716, and *Central Motors Ltd. v. Cessnock Garage and Motor Co.*, [1925] Sess. Cas. 796, followed.

*Per* LATCHFORD, C.J.:—The defendant was also liable upon the ground that he was negligent in the selection of the particular servant as one to whom valuable property of a third person should be entrusted: *Williams v. Curzon Syndicate Ltd.* (1919), 35 Times L. R. 295, 475.

*Per* MASTEN, J.A.:—The element of *mens rea*, which was absent in *Hirshman v. Beal* (1916), 38 O.L.R. 40, was present in this case, and, when the defendant's servant turned aside from his proper course, he stole the car; but, notwithstanding the theft, the defendant remained civilly responsible as bailee for the act of the man whom he had employed to carry out the contract to keep the car safe and redeliver it to the bailor.

AN appeal by the plaintiff from the judgment of the County Court of the County of York (WIDDIFIELD, Jun. Co. C.J.) dismissing an action brought by a customer of the defendant, the owner of a service station, to recover damages for injury to the plaintiff's motor-car, which had been entrusted to the defendant to be supplied with gas and oil and to be washed. A servant of the defendant set out with the car to take it from the service station to a garage to be washed, as was the servant's duty; but he changed his mind on the way to the garage, picked up companions, and took them for a drive in another direction, and in driving the car ran it against a telephone pole and injured it.

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TON.

The County Court Judge held that the defendant was not liable to the plaintiff.

September 20 and 21. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, JJ.A.

*T. J. Agar*, K.C., for the appellant, argued that the defendant was liable on a breach of contract. Having accepted the appellant's motor-car for certain purposes and having then entrusted it to an employee, the defendant is liable to the owner for the acts of the employee, even though not engaged in his duty. Reference to *Evans v. Williams* (1924), 232 Ill. App. 439; *Corbett v. Smeraldo* (1918), 102 Atl. Repr. 889. The defendant is liable under the law of master and servant. When he accepted the car he knew that it would have to be entrusted to an employee, and, the employee having taken it for proper purposes, the defendant is liable for his acts: *Lloyd v. Grace Smith & Co.*, [1912] A.C. 716. The master is liable to the owner for negligence in not making proper inquiry as to the character and honesty of his employee, when, in the ordinary course of his employment, he is to be entrusted with valuable goods of his customer: *Williams v. Curzon Syndicate Ltd.* (1919), 35 Times L.R. 295, 475. The defendant has not discharged the onus of rebutting the *prima facie* negligence established by the appellant: *Roach v. Yellow Cab Co. Inc.* (1928), 141 Atl. Repr. 767; Salmond's Law of Torts, 6th ed., pp. 104, 105.

*R. W. Hart*, for the defendant, respondent, contended that there was no privity between the appellant and respondent in respect of the contract to take the car from the service station to the washing garage. The appellant was not a new customer. He did not deal directly with the respondent, and, knowing the practice of the service station, he contemplated the course of action followed by the respondent. The respondent, if he became a bailee, is not liable for the crimes committed by his employee. In any event the misconduct of the employee was not committed in the ordinary course of his employment and therefore the respondent cannot be liable. The respondent, having employed the servant for a period of six months, and having during that time found him to be an excellent, efficient, and popular workman, has discharged any obligation which might rest upon him to inquire as to his character and honesty. As he entrusted his own cars to the employee, he exercised the same care with regard to the customers' cars as he did towards his own. This rebuts any



suggestion of negligence. In any event there is no evidence that anything derogatory to the employee could have been discovered by any reasonable inquiry. The onus resting on the appellant in this respect has not been discharged. Reference to *A. L. Underwood Ltd. v. Bank of Liverpool*, [1924] 1 K.B. 775, at p. 791; *Coupé Co. v. Maddick*, [1891] 2 Q.B. 413; *Sanderson v. Collins*, [1904] 1 K.B. 628; Beven on Negligence, 4th ed., vol. 1, p. 734.

*Agar, K.C.*, in reply. The employee's misconduct did not constitute a crime which would absolve the respondent. There was no intention on his part to steal the car. He was merely a trespasser for the time being. Reference to *Sleath v. Wilson* (1839), 9 C. & P. 607; *Jennings v. Canadian National Railway Co.*, [1925] 2 D.L.R. 630.

October 19. LATCHFORD, C.J.:—This appeal is from the judgment of Widdifield, Jun. Co. C.J., in the County Court of the County of York, dated the 16th March, 1928, which dismissed the action with costs. It was first argued before this Court differently constituted and composed of but four Justices. As opinion seemed to be equally divided, and the case involved matters of general importance, a rehearing was directed. The appeal was finally argued by the same counsel before a Court composed of all the members of this Division on the 20th September, 1928.

Apart from the amount of damages, no material fact is in dispute, and the question for determination is purely one of law.

On the evening of the 31st August, 1927, the plaintiff delivered at the defendant's service station in Bay-street Toronto, a La Salle motor-car, in use but two or three weeks, that had cost the owner \$4,250. The car was to be supplied with gasoline and oil and washed in the same manner as the same or another car of the plaintiff had been previously replenished and cleaned when placed overnight at the defendant's Bay-street establishment. The defendant had there no proper facilities for washing cars, but it was his practice to have cars placed with him for that purpose transferred by his employees to the Commonwealth Garage in King-street, owned by a limited company in which he held a controlling interest. The plaintiff says he assumed that his car would be washed at the service station, but Captain Donovan, the defendant's manager there, says that on one occasion—apparently not on the evening in question—he told

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the plaintiff that a car was not washed at the service station, but was sent down for that purpose "to our garage." The contradiction, if any, is in my opinion quite immaterial.

Necessarily the defendant had to have the plaintiff's car transferred by his servants to the Commonwealth Garage. One of these, known as William Cara, had been in his employment about six months, at first in minor capacities and later as driver of the defendant's personal car and as one of the principals at the service station under the manager. On the night the plaintiff's car was placed at the service station, Cara was, after 9 p.m., the senior man in charge. Another employee, a boy of 17, named George Gauthier, was subject to Cara's direction. According to Mr. Warrington, one of Cara's duties was to take customers' cars down to the Commonwealth Garage to be washed. Cara was a polite and efficient servant, and was popular with the defendant's customers. At no time before or during the six months was any reference sought for or furnished from a previous employer of Cara, nor was any inquiry made as to his reputation.

It was not the defendant's custom to employ a person without making inquiries as to his past; and, although he knew nothing about Cara's record as to honesty or integrity, he was pleased with the man's personality when applying at the Commonwealth Garage for work as a washer, and sent him up to Captain Donovan, who engaged him because he also liked his looks, and promoted him from time to time because "he knew a lot about cars," and was otherwise remarkably efficient and satisfactory.

It was proved that Cara's real surname was McDonald and that the name he had assumed was that of a respectable mechanic in Brantford, whose wife disappeared from that city at the same time as McDonald himself. As McDonald he was well known in Brantford, where, according to the real Cara, he did not bear a very good reputation. Captain Donovan admitted that he would not have employed Cara if he had known the man was travelling under an assumed name.

It is not disputed that McDonald (as I shall hereafter call him) was acting as the servant and agent of the defendant when he ran the plaintiff's car out of the service station at 10.30 or a little later on the same night. According to his companion Gauthier, his purpose at the time was to take the car down to the Commonwealth Garage, as was customary when cars were

left to be washed at the service station. He was doing what he was directed to do by Captain Donovan, or, in other words, acting within the scope of his employment.

When proceeding on his way, which was down Yonge-street, he picked up three girls, procured a mate for the odd one, obtained—apparently from a “bootlegger”—a bottle of liquor, and drove to Brantford, drinking freely *en route*. There he ran against and broke a 14-inch telephone pole, damaging the automobile to such an extent that it cost the plaintiff \$533.96 to repair it. On learning that his car had been wrecked, the plaintiff paid \$35 for taxi-fare to Brantford. Why he did not go by rail is unexplained. Not improbably a train was not readily available. While his car was undergoing repair he was at an expense of \$189 for the use of another car necessary in his business. Van Geel then traded the repaired car for a car of the same kind with a spare wheel worth \$100, and paid in cash to the vendor \$1,000. He claims to be entitled to recover \$900 for depreciation in value of the damaged car.

Prescinding for the moment the question of quantum, I am of opinion that the plaintiff is entitled to recover damages in the circumstances, and that therefore the appeal should be allowed.

I desire to point out, in the first place, that the many cases which determine that a master is not liable for a wrong committed by a servant when not engaged in his master's business have not the slightest application in the present case. If, for example, the telephone company brought action against Mr. Warrington for the damage caused to its property at Brantford, he would have an impregnable defence. This action is founded not on tort but on contract. For hire the defendant contracted to do certain work on the plaintiff's car, and, that work done, to return it to the plaintiff—what is known in law as *locatio operis faciendi*. In such cases, before a depositor can recover in a suit against a bailee, he must establish that the damages claimed have resulted from the bailee's negligence in carrying out the contract.

Where an article of value is given into the sole custody of a person, and he accepts it as bailee, and it is damaged while in his custody, the onus lies on him of negating negligence on his part: *Phipps v. New Claridge's Hotel Ltd.* (1905), 22 Times L.R. 49.

Not only was there failure on the part of the defendant to

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1928. evidence that he failed in his duty to the plaintiff.

VAN GEEL The defendant was not an insurer, and in several circum-  
v. stances, even as a bailee for hire, he would not be liable, as, for  
WARRING- instance, if his garage, properly secured, was broken into by a  
TON. burglar and the car stolen.

Latchford, The liability attaching to a bailee where loss or damage is  
C.J. caused by his servant or agent rests on a different ground.

*Williams v. Curzon Syndicate Ltd.* is in point. It was tried by Rowlatt, J. (1919), 35 Times L.R. 295. The plaintiff, a member of a residential club, gave the manager certain jewellery valued at £250, which was deposited in the club's safe. The jewellery was stolen from the safe by the night porter, one Lister, employed by the defendants, who before employing him had obtained references from two persons in whose service he had been. After the theft it was discovered that the porter was a dangerous criminal. In his carefully reasoned judgment, at p. 297, the learned Judge says:—

“For an institution such as a residential club to be satisfactorily conducted it is necessary that servants should be engaged by the proprietors and that those servants (especially any that have such duties and responsibilities as the night porter had in this case) should be honest and trustworthy. . . . From this position there arises an implied contract that the proprietors shall use all proper care (and in such a case proper care means a large measure of care, for the risks are great) to see that the servants are honest persons. Such a contract is implied because the intentions of the parties cannot be achieved without it.”

The defendants were found liable and appealed to the Court of Appeal (Bankes, Duke, and Atkin, L.JJ.), which affirmed the judgment: (1919) 35 Times L.R. 475. The main ground of appeal was that there was a rule of the club excluding liability, but it was held that the rules did not cover a case of wilful misconduct on the part of a servant.

Applying the reasoning of Rowlatt, J., to the present case, it was necessary that servants should be engaged by the defendant to transfer cars from the service station to the Commonwealth Garage. Such servants should be honest and trustworthy, especially as great risk was run in placing them in charge of property of great value such as the plaintiff's car. Inquiry would have established the bad reputation of McDonald. An implied



contract existed between Van Geel and Warrington that the latter should use a large measure of care in the selection of such servants entrusted with articles of value.

On this ground alone I think the plaintiff entitled to succeed.

Other grounds may be inferred from the *ratio decidendi* in *Lloyd v. Grace Smith & Co.*, [1912] A.C. 716.

The appeal should in my opinion be allowed. The damage should be limited by reducing the \$900 to \$500. The plaintiff received a new car worth to him fully \$400 more than the damaged car. Adding the \$500 to the \$533.96, \$35, and \$189, his damages amount to \$1,257.91. He should have judgment for that sum with interest and costs here and below.

RIDDELL, J.A.:—The defendant is the proprietor of the Red Indian Service Station, a garage, etc., in Bay-street, Toronto; he is also a large shareholder in the Commonwealth Garage in Victoria-street; the former has no facilities for washing cars, and when a car comes in requiring washing it is sent as a matter of ordinary routine to the Commonwealth Garage for that purpose, and when it has been washed is brought or sent back to the Red Indian Service Station.

The defendant has a manager, Captain Donovan, in charge of the Red Indian; but, of course, he is not at the station all the time, and there are two senior men who are, one or the other, always in actual charge—as the defendant says, “We always had a senior man in charge there.” On the 31st August, 1927, the plaintiff came into the Red Indian Station with a valuable car; this was in the evening, and a “senior man,” who called himself Cara, his real name being McDonald, was in charge; and the plaintiff told him to oil and grease the car, fill with gas and wash it, having it ready by 5.30 next morning—the witness Gauthier says 6, but the difference is of no significance. The car was put on the grease-pit, and supplied with gas; it did not need oil, and there remained only to wash it. Cara, the “senior man,” in charge, directed his junior to take the car round to his (Cara’s) place, the intention being that they should change their working clothes, take the car to the Commonwealth Station, leave it there to be washed, and then go to the Exhibition then in progress. Gauthier, the junior, did so, went home and changed his clothes and came back to the Red Indian, where Cara still was. Then Cara went home and changed his clothes;

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and the two, Cara and Gauthier, got into the car to drive it to the Commonwealth to be washed. On the way, they had got as far as Grosvenor-street, when Cara "saw some girls and he stopped the car." I can find no reason to doubt the defendant's own view of the situation, when, on the examination for discovery, he gives the following answers:—

"159. Q. And, as I understand you, under those standing instructions to him, you take the position that it was his duty to take that car from the Red Indian Service Station directly to the Commonwealth Garage? A. Yes."

"164. Q. In the final analysis, then, your story of this occurrence is that he started off all right to carry out his instructions and duty, by taking the car down Yonge-street? A. Yes.

"165. Q. And then what do you say? A. He fell by the wayside.

"166. Q. He fell down in his duty, then, on the way? A. Yes.

"167. Q. So that he was performing his duty up to the time he picked up the girls? A. Yes.

"168. Q. And he was carrying out your obligation to the plaintiff, up to the time that he took the girls into the car—that is true, isn't it? A. Yes.

"169. Q. And when he took the girls into the car there was a breach, in your opinion, of your obligation to Mr. Van Geel, and also Cara's obligation to you? A. Yes, of Cara's obligation to me, certainly."

Unfortunately for all concerned, Cara, who seems to be somewhat impressionable, "fell for the women," and he with Gauthier, the two women, and another whom they picked up, went for a "joy-ride," not forgetting that very frequent concomitant of joy-rides, a bottle of whisky. They sped westward, and came to grief near Brantford; in the morning, the plaintiff looking for his car, it was found missing; shortly afterwards, the whole story came out; the plaintiff, asking to be paid for his loss, was met with a refusal; this action was brought, and on a trial before his Honour Judge Widdifield, that learned Judge dismissed the action on what he considered the existing law as to bailments.

The plaintiff appealing, the appeal came on before four Judges, and, by reason of a difference of opinion, it was thought wise to have it re-argued before the full Court.

The appeal was argued with great care and thoroughness on both sides; and it remains to consider the law as applied to the facts, which are practically undisputed.

The case then is that Cara was an employee of the defendant, "instructed by the" defendant as "the representative of the defendant"—and the plaintiff so treated him throughout—to "attend to" the plaintiff's car. He took advantage of the opportunity so afforded him as the defendant's representative to "take the car away for his own advantage." This "was a breach by the defendant's agent of a contract made by him as the defendant's agent to apply diligence and honesty in carrying through a business within his delegated powers and entrusted to him in that capacity." It was also a tortious act committed by the employee "in conducting business which he had a right to conduct honestly, and was instructed to conduct on behalf of his principal."

The defendant "put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in."

I do not propose to discuss the law of bailment, generally, or the cases before 1912, which are nowhere better or more clearly and satisfactorily discussed than in the Wisconsin case to which our attention was called by my learned brother Masten, *Firemen's Fund Insurance Co. v. Schreiber* (1912), 150 Wis. 42. I admit my inability to follow the reasoning or appreciate the justice of some of them; and were I making, and not simply declaring, the law, I should employ totally different language from that in many of these cases. As I see it, we are relieved from considering these earlier cases here; by the recent decision of the Judicial Committee, we must take a decision of the House of Lords as the law, no matter what other Courts, in England, Dominion or Colony, may say; and, unless and until the Judicial Committee say something different, we must follow the House of Lords.

The case of *Lloyd v. Grace Smith & Co.*, [1912] A.C. 716, is to my mind conclusive here: Cara comes within the very words of Lord Loreburn at p. 724; and the master's liability is as stated in the words of Lord Macnaghten on p. 733, quoting the language of Willes, J., adopted by Sir Montague Smith in the Privy Council case of *Mackay v. Commercial Bank of New Brunswick* (1874), L.R. 5 P.C. 394, at p. 410.

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While I base my opinion on the law as laid down for us by the House of Lords as above, I am not to be taken as holding that the plaintiff is not entitled to succeed on the ground of the negligence of the defendant in the entrusting of a valuable car to Cara without any inquiry as to his past, his reliability—all that was considered was his capacity as a workman. This, however, does not enter into my judgment.

I think that the appeal should be allowed with costs throughout; I am not prepared, on the evidence so far produced, to fix the amount of damages; I should prefer that, if the parties cannot agree, the amount should be fixed by the Master or clerk, who would dispose of the costs of the reference, if one should be necessary; but, as my learned brethren find enough to fix the damages, I do not dissent.

MIDDLETON, J.A.:—The finding that as a matter of law the keeper of a garage can escape liability for the loss of a car placed in his charge by its owner, upon proof that the car was improperly removed from the garage and wrecked by an employee who, contrary to his master's orders, took it from the garage upon a frolic of his own, seems so shocking and repugnant to one's ideas of justice as to invite the closest scrutiny. I am glad to arrive at the conclusion that this doctrine rests on no solid foundation.

I think that the ordinary principles of the law of master and servant and principal and agent apply to the case of a bailee. Such a bailee as the keeper of a garage is not an assurer of the cars entrusted to him. His obligation is to "take the same care as reasonable men ordinarily use in their own affairs;" and, had the car been taken from the defendant's care, notwithstanding the use of due diligence, by a stranger, the defendant would not have been liable.

A master is liable for the conduct of his servant, the agent whom he selects and puts in his place to discharge the duty he has undertaken, and this law is applicable in the case of bailment. The conduct of the servant is then the conduct of the master, and the master is liable to the bailor.

When the foundations of our law were being laid by Sir John Holt, "that perfect master of the common law," he placed the master's liability upon a simple and sound principle, "Seeing some one must be a loser . . . it is more reason that he that employs and puts a trust and confidence in" the defaulting



servant "should be a loser than a stranger:" *Hern v. Nichols* (c. 1700), 1 Salk. 289.

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It is equally plain that a master cannot be made liable for all the wrongful acts of the servant upon the mere proof of the relationship. From time to time attempts were made to state the principle exempting the master. When the servant was not about the master's business at all, the master could not be liable for the servant's torts. A case of difficulty arose when the servant in charge of a certain business of the master went, to use the expression now classic, already quoted, "on a frolic of his own:" e.g., a servant without authority takes his master's horse and going for a ride negligently injures a pedestrian on the ride. The servant has done the pedestrian a wrong by his negligence. The master cannot be held liable because he was not doing anything the master had employed him to do, nor could he be made liable because it was the master's horse which the servant had taken wrongfully and without permission

Lord Brougham in *Duncan v. Findlater* (1839), 6 Cl. & Fin. 894, 909, 910, thus states the law:—

"The rule of liability, and its reason, I take to be this: I am liable for what is done for me and under my orders by the man I employ, for I may turn him off from that employ when I please; and the reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does being done for my benefit and under my direction, I am responsible for the consequences of doing it."

The words here used, "for the master's benefit," were by no means inapt for the purpose then in hand, but they have given rise to much misunderstanding, which has been, I think, cleared up in the case of *Lloyd v. Grace Smith & Co.*, [1912] A.C. 716.

In that case a clerk was employed in a solicitor's office. He waited upon a client and received valuable securities. These he stole. He intended to steal from the time he saw the securities. It was argued that his whole conduct shewed that in his dealings with that client he was not acting for his master's benefit but for his own. In the Lords this contention had short shrift, and the law was restored to the simple and satisfactory position in which Sir John Holt had placed it some 200 years earlier. The master chose the servant to represent him and is answerable for his conduct in the master's business, and the idea that the master was free because the servant intended his

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own gain and cared nothing for the master's affairs was put an end to.

In the judgments in the House of Lords it is conclusively shewn that *Barwick v. English Joint Stock Bank* (1867), L.R. 2 Ex. 259, had been misunderstood and that it was a mistake to suppose that Willes, J., "one of the most learned and accurate exponents of the law of England who ever sat upon the Bench" (*per* Lord Haldane in *Viscountess Rhondda's Claim*, [1922] 2 A.C. 386), and his almost equally great colleagues, ever intended to determine that the master "is absolved whenever his agent intended to appropriate for himself the proceeds of his fraud" ([1912] A.C. at p. 725).

In some of the cases much confusion has arisen by failing to distinguish exactly what is meant by the expression "about the master's business." In considering this it must always be kept in mind that the master may owe a duty to one with whom he has contracted, which duty he cannot evade by entrusting the performance of the contract to a servant and at the same time be free of responsibility to a stranger for a tort committed by the same servant outside the scope of his employment. To illustrate: the master has agreed to keep the plaintiff's car safely. He employs a servant to do this, and the servant stands in his place. The servant takes the car out upon what in modern parlance is called "a joy-ride"—the master must answer for the servant's wrong if the car is not duly cared for. If in the course of this ride a pedestrian is injured, the master is not answerable because he can set up in answer to any claim by the pedestrian, "I did not employ this man to drive this car; he took it without my leave. His negligence injured you; true he was acting wrongfully so far as I was concerned at this same time, but this does not make me liable to you."

He cannot say this to the owner of the car if it should be damaged, because it was his contract to keep the car, and the servant stood as to the owner in the place and stead of the master, and the master's liability is the same as if he had himself remained in charge of the car.

Earlier cases go far to justify the view taken by the learned County Court Judge, but I do not discuss them, because they are all based upon a view of the law now definitely rejected as erroneous. The full implication to be drawn from the decision of the Lords in 1912 has perhaps not been sufficiently appreciated.

In a very important decision in the Court of Session, *Central Motors (Glasgow) Ltd. v. Cessnock Garage and Motor Co.*, [1925] Sess. Cas. 796, the circumstances were almost precisely similar to the facts in the present case. A servant improperly took a car from the garage contrary to the garage-keepers' instructions, and it was injured. The keepers were liable "because they had delegated their duty of keeping the car safely to their servant. They were liable for the servant's failure in performance." The question was left open whether the misconduct of the defendant's servant could ever be a good defence to an action for breach of a contract of *locatio operarum*. The decision is based entirely upon *Lloyd v. Grace Smith & Co.*, *supra*.

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Following the example of the Scotch Court and its caution, I would leave open and in abeyance the question as to the possibility of any defence to an action by the bailor based upon misconduct of the servant.

As a clear statement of the law, I quote one passage from the judgment of Lord Cullen (p. 802):—

"The question is not to be answered merely by applying the test whether the act in itself is one which the servant was employed or ordered or forbidden to do. The employer has to shoulder responsibility on a wider basis; and he may, and often does, become responsible to third parties for acts which he has expressly or impliedly forbidden the servant to do. A servant is not a mere machine continuously directed by his master's hand, but is a person of independent volition and action, and the employer, when he delegates to him some duty which he himself is under obligation to discharge, must take the risk of the servant's action being misdirected, when he is, for the time, allowed to be beyond his master's control. It remains necessary to the master's responsibility that the servant's act be one done within the sphere of his service or the scope of his employment, but it may have this character although it consists in doing something which is the very opposite of what the servant has been intended or ordered to do, and which he does for his own private ends. An honest master does not employ or authorise his servants to commit crimes of dishonesty towards third parties; but nevertheless he may incur liability for a crime of dishonesty committed by the servant if it was committed by him within the field of activities which the employment assigned to him, and that although the crime was committed by the servant solely in pursuance of his own private advantage. The

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servant is a bad servant who has not faithfully served, but has betrayed his master: still, *quoad* the third party injured, his dishonest act may fall to be regarded as an ill way of executing the work which has been assigned to him, and which he has been left with power to do well or ill."

This makes it quite unnecessary to consider the question of the liability of the present defendant upon the theory that he was negligent in the selection of this particular employee as one to whom valuable property of a third person should be entrusted. It is in my opinion a dangerous thing for a master to entrust cars worth many thousands of dollars to the care of one of whom he has little knowledge.

There only remains the question of the amount of recovery. It cost \$533.96 to repair the car, and when it was repaired the car was not of its original value and "was turned in" upon the purchase of a new car at a loss of \$1,000. It is true that for the purpose of trade the car is depreciated the moment it is sold, but this really means that the purchaser of a car is called upon to pay a considerable sum for the expense of selling and the immediate vendor's profit on the sale. The car itself is not actually depreciated. On purchasing a car to take the place of the one damaged the purchaser has to make a like unprofitable expenditure.

I would give judgment for the amount of out-of-pocket expenses, plus \$500 depreciation, leaving the plaintiff to stand \$500, representing the depreciation of the car by his actual use of it.

The plaintiff should have his costs throughout.

ORDE, J.A., agreed with MIDDLETON, J.A.

MASTEN, J.A.:—Contrary to the view which I entertained after the first argument of this appeal, I have been convinced by the reasoning of my brethren that the appellant ought to succeed.

In this case the servant who caused the injury complained of was chosen by the master and was put in a position of control to fulfil the duty which the master had personally undertaken, viz., to wash and oil the plaintiff's car, keep it safely, and return it to him. Moreover, the servant was authorised by the master to take cars out of the garage in Bay-street and drive them to the Commonwealth Garage in Colborne-street to be washed. Having taken the car out, ostensibly for the purpose



of washing, he went on a "joy-ride" of his own and injured the car.

Whether one takes the view that, being employed to take care of the car in question, the servant acted ill in that employment, or the view that his failure to fulfil the duty which his master had personally undertaken (viz., to see that the plaintiff's car was kept secure and safe) was the direct cause of the injury, in either case I think the master is liable for damages for breach of his contract. This conclusion results, in my opinion, from the principles established in the Courts of England and Scotland, as is pointed out by my brother Middleton, and is supported by the following American authorities: *Corbett v. Smeraldo*, 102 Atl. Repr. 889; *Evans v. Williams*, 232 Ill. App. 439; as well as by the powerful dissenting opinion in *Firemen's Fund Insurance Co. v. Schreiber*, 150 Wis. 42.

Having had an opportunity of considering the judgment of my brother Middleton, in the conclusions and reason of which I fully concur, I desire to add only two observations:—

In view of the nicety of the question here raised, the long conflict of judicial opinion regarding the inter-action of two well settled legal principles, and particularly in view of recent opinions of distinguished Judges (I refer to the opinion of the Chief Justice of England in *Mintz v. Silverton* (1920), 36 Times L.R. 399, and to the reasons of the Court of Appeal in the somewhat analogous case of *Kreditbank Cassel G. m. b. H. v. Schenkers*, [1927] 1 K.B. 826), as well as to the circumstance that *Cheshire v. Bailey*, [1905] 1 K.B. 237, is not overruled but is treated with respect in *Lloyd v. Grace Smith & Co.*, I desire to limit my judgment to the facts of the present case, and, as in the Scotch case of *Central Motors (Glasgow) Ltd. v. Cessnock Garage and Motor Co.*, [1925] Sess. Cas. 796, to reserve the general question whether the misconduct of the bailor's servant can ever be a good defence to an action for a breach of a contract of *locatio operarum*.

I should observe in that connection that, speaking for myself only, I think that in this case the car was stolen by the defendant's employees. Without repeating what I said in *Hirshman v. Beal* (1916), 38 O.L.R. 40, at p. 51, I would point out that the element of *mens rea* which was lacking in that case is in my opinion here present, and when the defendant's servants turned aside on a joy-ride to Brantford I think they stole the plaintiff's car. While the defendant would not be responsible for a tort committed by Cara or McDonald while

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driving the stolen car, he did, notwithstanding the theft, remain civilly responsible as bailee for the act of the man whom he had employed to carry out the contract made by him with the plaintiff, viz., safely to keep and redeliver the car to his bailor.

The claim that the defendant as bailee is liable for negligence in employing Cara or McDonald without references and without investigation involves no new principle. It is settled law that a bailee is liable for negligence in the fulfilment of his obligation. Whether in any particular case the evidence establishes negligence is always a question of fact, and, if I were under the necessity of deciding this appeal on that ground, I should be inclined to hold that no sufficient ground is shewn on which to reverse the finding of fact of the trial Judge. But I rest my conclusion that the appeal should be allowed on the liability of the master for the act of the servant entrusted with the fulfilment of the masters' contract, and not on the ground of negligence.

While agreeing fully with the warning note sounded on this point by some of my brethren, I think it would be dangerous to attempt to lay down any fixed rule, as every case of negligence must depend on its own facts.

I agree in the result proposed by my Lord the Chief Justice.

*Appeal allowed.*

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*Municipal Corporations—By-law of Police Commissioners of City—Validity when Passed—Effect of Statute Depriving Commissioners of Power to Pass such By-laws in Future—No Repeal of Previous Legislation—R.S.O. 1914, ch. 192, sec. 422—17 Geo. V. ch. 140.*

A by-law passed by the police commissioners of a city in 1915, admittedly valid when passed, provided that it should not be lawful for any person to use any vehicle in the "jitney 'bus service" for gain without being licensed so to do. S. had had a "jitney" licence, but it expired on the 30th June, 1928. He continued to operate without a licence and was convicted of a breach of the by-law. The commissioners had ceased to issue jitney licences, because of an Ontario statute passed in 1927, 17 Geo. V. ch. 40, validating an agreement between the city corporation and a street railway company, which provided that the corporation should not issue any new jitney licences and that existing licences should not continue in force after the 30th June, 1928:—

*Held*, that the validity of the by-law was not destroyed.

There is no authority for the proposition that legislation, valid on its passing, ceases to be valid when the legislating body is deprived of the power to pass such legislation in the future, there being no repeal of previous legislation or reference thereto in the depriving statute.

*Regina v. Hiscox* (1879), 44 U.C.R. 214, explained and distinguished. The conviction was, therefore, upheld.

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RE  
SHAWRA.

AN appeal by Martin Shawra from an order of one of the Judges of the County Court of the County of Wentworth, sitting in a Division Court, affirming a conviction of the appellant by the Police Magistrate for the City of Hamilton for contravention of by-law No. 36 of the Police Commissioners of that city.

September 21. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, J.J.A.

*J. C. McRuer*, for the appellant, contended that the by-law was prohibitive and not merely licensing or regulating. The by-law purported to be passed under sec. 422 of the Municipal Act, R.S.O. 1914, ch. 192. But the power to pass regulations was taken from the police commissioners and vested in the city council by virtue of a private Act of the Ontario Legislature, the Hamilton Street Railway Company Act, 1927, 17 Geo. V. ch. 140. By that enactment, which confirms the agreement made between the city corporation and the street railway company, the city corporation is prohibited from issuing licences. The old Act being virtually repealed, the city cannot now prosecute under it for operating without a licence: *Regina v. Hiscox* (1879), 44 U.C.R. 214. In any event, the Act referred to is *ultra vires* and in contravention of the British North America Act because it interferes with trade and commerce.

*D. L. McCarthy*, K.C., and *A. J. Polson*, for the respondent, contended that the right of the police commissioners to pass the by-law could not be questioned. The Act of 1927 ratified the agreement made by the city corporation with the street railway company that no jitneys should run in the city and justified the refusal to grant a licence. Under sec. 262 of the Municipal Act, there is power to prohibit as well as to regulate. Therefore the old cases do not apply. The city corporation therefore had power to refuse licences to do what the police commissioners had power to regulate, and its decision is not subject to review by any court. The Act of 1927 does not repeal the by-law previously passed. It remains in force and prosecutions can be had under it.

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RE

SHAWRA.

Riddell,

J.A.

October 19. At the request of the Chief Justice the judgment of the Court was read by RIDDELL, J.A.:—In this appeal we reserved our decision, not from any real doubt as to what it should be, but because of the great importance to many of the questions to be decided.

The appellant, Martin Shawra, was brought before the Police Magistrate for the City of Hamilton, on the charge that he “did unlawfully use motor-vehicle No. 109-937 for the public conveyance of passengers within the said city for gain without being licensed so to do, contrary to the provisions of by-law No. 36 of the Board of Commissioners of Police of the City of Hamilton.”

On this charge, being tried, he was convicted and adjudged to pay a fine of \$20, or in default to be kept in the common gaol at Hamilton for 14 days.

He appealed to the Division Court Judge, and that learned Judge, his Honour Judge Brandon, affirmed the conviction.

Thereupon he applied to the Attorney-General for Ontario, and that officer granted a fiat whereby an appeal was brought before us under the Summary Convictions Act, R.S.O. 1927, ch. 121, sec. 14 (2). The matter has been fully and exhaustively argued, and it remains only to give judgment in the case.

The facts are not in dispute. The board of police commissioners, on the 24th June, 1915, passed a by-law, No. 36, providing, *inter alia*, as follows:—

“2. It shall not be lawful for any person to use any vehicle in the jitney bus service for gain without being licensed so to do as hereinafter provided, and a licence granted pursuant to the cab by-law passed on the 14th October, 1910, shall not authorise any person to operate a ‘licensed omnibus.’

“3. Every application for a licence for a ‘licensed omnibus’ shall be signed by the owner of the vehicle for which the licence is required, and such application shall give the following information:—

“(a) Owner’s name and address.

“(b) Number of permit for motor-vehicle issued pursuant to Motor-Vehicles Act for which licence is required.

“(c) Name of manufacturer of car, seating accommodation, and manufacturer’s number of car.

“4. No licence for a ‘licensed omnibus’ shall be granted to the owner of any vehicle with less seating accommodation than is required for five adult persons. Satisfactory proof of the seating accommodation of such vehicle shall be furnished the chief of



police, and no greater number of passengers shall be carried in such vehicle at the same time."

The appellant had had a jitney licence, but it expired on the 30th June; he continued, however, to operate in furnishing jitney service, admittedly without any licence, and was convicted accordingly.

The fact that the board had ceased to issue jitney licences was admitted—the reason being the Ontario statute of 1927, an Act respecting the Hamilton Street Railway Company, 17 Geo. V. ch. 140, making legal, valid and binding an agreement whereby it was agreed (clause 10 (*a*)) that the City of Hamilton should "not issue any new jitney licences or sanction the transfer of any such licence at present in force, nor shall any such jitney licence now in force remain in force after the 30th June, 1928." The intention was declared to be that the street railway company should not "be subject to competition in its business of transporting passengers between points in the city." Of course, it would be the grossest breach of faith if the city were to grant a new licence; and no one would contend that the board would be justified in renewing such a licence.

It is admitted—and, indeed, it could not be denied with any hope of success—that the by-law No. 36 was within the powers of the board at the time of its passing; and the only argument that has even a semblance of validity is that, the power being now taken away from the board (and possibly given to the city) to grant or refuse a licence, as a consequence the validity theretofore existing of the by-law is destroyed. This argument is wholly based upon the judgment of Armour, J., in *Regina v. Hiscox*, 44 U.C.R. 214.

In that case, the power of granting licences for livery stables, etc., which had been given by C.S.U.C. ch. 54 to the municipal councils, was taken away by 31 Vict. ch. 30, sec. 33 (Ont.), as amended by a subsequent statute, 32 Vict. ch. 43, sec. 22, and given to the board of commissioners of police, while a subsequent Act made it the duty of the board to exercise their power, and repealed all Acts inconsistent therewith. The learned Judge held that the by-law previously passed by the council, although unrepealed, had become ineffective. Were the present case on all fours with that case, we should have to consider with great care the opinion of that much esteemed Judge—and we certainly would do so before reversing or declining to follow his decision. I do not think that this decision applies to our case, as will be

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seen by the language employed in giving the grounds of the conclusion arrived at. The learned Judge says (p. 217):—

“I think that the effect of this legislation, in first taking away from the city council the power of passing by-laws for regulating and licensing the owners of livery-stables, and vesting this power in the Board of Commissioners of Police, and in then making it imperative upon the Board of Commissioners of Police to regulate and license the owners of livery-stables, and in repealing the legislation inconsistent with the duty so imposed upon them, has been to render the by-law in question, in so far as its provisions are in controversy here, of no further force or effect.”

The gist of this statement is found in the words “in . . . making it imperative upon the Board of Commissioners of Police to regulate and license the owners of livery-stables, and in repealing the legislation inconsistent with the duty so imposed upon them.” Plainly, what is meant is that, after the latest Act, the duty of regulating livery-stables, etc., was cast upon the board, and the board was to use its judgment, not the judgment in past time of the council as to regulation of these stables, etc. Consequently, livery-stable keepers were to look, not to the council, either of the past or of the present, for regulations as to how they were to conduct their business, and under what conditions—they were to look to the board. There is nothing of this kind here, nor is there any repeal of legislation, etc., inconsistent with the new power given to a new body.

If the case should be considered to go so far as to cover this case, I should have no hesitation in declining to follow it; but there is no necessity of either affirming or rejecting it.

There is no other authority advanced, and I can find none to support the proposition that legislation, valid on its passing, ceases to be valid when the legislating body is deprived of the power to pass such legislation in the future, there being no repeal of previous legislation or reference thereto in the depriving statute.

It may well be that, had the statute of 1927 placed in the council the power of regulating jitneys and giving licences, etc., and made it the duty of the council to exercise that power, the former by-law would become effete; but there is nothing of the kind here; on the contrary, the council is forbidden to issue licences at all.

Some other objections of a trivial nature we disposed of at the hearing, and they need no mention here.

I can find no error in law in the judgment appealed from, and would dismiss the appeal.

*Appeal dismissed.*

## [APPELLATE DIVISION.]

RE ROWE AND HARRIS.

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Oct. 19.

*Mandamus—Order Directing Assignee of Mortgagee to Assign Mortgage—Mortgages Act, sec. 2—Jurisdiction—Rule 622—Summary Application by Mortgagor upon Originating Notice—Distinction between Prerogative Writ and Mandatory Order—Enforcement of Private Right.*

Where a mortgagor, under sec. 2 of the Mortgages Act, R.S.O. 1927, ch. 140, tendered to the assignee of the mortgage the amount and asked for an assignment to her nominee, which was refused:—

*Held*, that the mortgagor was not entitled to obtain, upon a summary application by originating notice, under Rule 622, a mandatory order directing the assignee to assign the mortgage.

To obtain such a mandamus—for the enforcement of a mere private right—an action commenced by writ of summons is necessary.. The mandamus obtainable upon summary application is the old peremptory or prerogative writ.

*Rich v. Melancthon Board of Health* (1912), 26 O.L.R. 48, approved. And the Court refused to consider and deal with the summary application as if an action had been brought and the application made in the action.

AN appeal by Helen Harris from a mandatory order made by McEvoy, J., in Chambers (26th June, 1928), directing the appellant to accept payment of principal and interest due on a mortgage as of the 1st June, 1928, and to assign the mortgage to the nominee of the mortgagor.

September 21. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, J.J.A.

A. C. *Heighington*, K.C., for the appellant, contended that this was not a proper case for a mandatory order because, firstly, no action had been brought; and, secondly, another remedy was available. The applicant relied upon sec. 16 of the Judicature Act, R.S.O. 1927, ch. 88, but this refers only to a mandamus granted in an action. Reference to *Glossop v. Heston and Isleworth Local Board* (1879), 12 Ch. D. 102; *Grand Junction Railway Co. v. County of Peterborough* (1883), 8 Can. S.C.R. 76, at p. 123.

A. D. *Armour*, K.C., for Marjorie L. Rowe, the applicant, now respondent, argued that a mandatory order comes within the term "mandamus," and so is available under Rule 622. There is at present no rule of practice as to how a mandatory order or mandamus should be asked for other than Rule 622, and under the present practice, if the remedy is not definitely the subject

App. Div. of an action, proceedings upon originating notice are available. Following *Eastview Public School Board v. Township of Gloucester* (1917), 41 O.L.R. 327, and *Toronto Public Library Board v. City of Toronto* (1900), 19 P.R. 329, on a proper case on the merits being made out, the Court should amend the proceedings so as to grant the remedy, or in any case the applicant is entitled to a declaration that she is entitled to pay off the mortgage and take an assignment to her nominee as of the date of the maturity of the mortgage. The parties having come before the Court, the Court has jurisdiction to grant the remedy which the circumstances of the case shew to be proper: *Stothers v. Toronto General Trusts Corporation* (1918), 44 O.L.R. 432. Reference also to *Bank of New South Wales v. O'Connor* (1889), 14 App. Cas. 273, 283, and *Re Patterson* (1928), 62 O.L.R. 255.

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October 19. RIDDELL, J.A.:—In 1923, Mrs. Rowe with her husband mortgaged a certain lot to the Canada Permanent Mortgage Corporation; in May, 1928, these mortgagees assigned the mortgage to Helen Harris; the mortgage becoming due on the 1st June, 1928, it is claimed that the solicitors for Mrs. Rowe tendered the assignee the amount due (with a proper sum to pay for the desired conveyance) and asked for an assignment to their client's nominee. This the assignee refused, saying that she had bought the mortgage as an investment. Thereupon, Mrs Rowe served a notice of motion "for an order directing Helen Harris to accept payment of the principal and interest . . . ."

This coming on before Mr. Justice McEvoy in Chambers, that learned Judge, on the 26th June, 1928, made an order in the following terms:—

"2. It is ordered and declared that the said Marjorie L. Rowe was on the 1st day of June, 1928, entitled to pay off a mortgage dated the 29th day of May, 1923 . . . . made by one Harvey B. Rowe and the said Marjorie L. Rowe to the Canada Permanent Mortgage Corporation . . . . which said mortgage was assigned by the Canada Permanent Mortgage Corporation . . . . to the said Helen Harris, and to require the said Helen Harris to assign the said mortgage to some third party, the nominee of the said Marjorie L. Rowe.

"3. And it is further ordered and directed that upon the said Marjorie L. Rowe paying off the said mortgage by paying to the said Helen Harris the sum of \$3,717.50, being all the moneys due in respect of the said mortgage both for principal and interest on the 1st day of June, 1928, the said Helen Harris shall forthwith



assign the said mortgage-debt and convey the said mortgaged lands to" the nominee of the mortgagor.

The assignee of the mortgage appeals to this Court, assigning, among other reasons, "that this is not a proper case for a mandamus."

Being of the opinion that the Court below had no jurisdiction to deal with the matter, we did not call for argument upon the merits—nor do we deal with them.

We are not favoured with a written judgment or with the reason why the learned Judge disregarded what is said in the judgment of the former Chancery Division in *Rich v. Melancthon Board of Health* (1912), 26 O.L.R. 48. The statement made by my learned brother Middleton, at pp. 53, 54, correctly sets out the law "that the mandamus which may be awarded in an action is either in the nature of the old equitable mandatory injunction, or is merely ancillary to the enforcement of a legal right for which an action might be maintained at law." To obtain such a mandamus, an action is necessary—and that is not this proceeding. The mandamus obtainable without a writ is the old peremptory writ: *Rich v. Melancthon Board of Health*, at p. 53; *Grand Junction Railway Co. v. County of Peterborough*, 8 Can. S.C.R. 76, especially pp. 122, 123; *City of Kingston v. Kingston Electric Railway Co.* (1898), 25 A.R. 462; *City of Hamilton v. Hamilton Street Railway Co.* (1904-05), 8 O.L.R. 642, 10 O.L.R. 594; *Hamilton Street Railway Co. v. City of Hamilton* (1906), 39 Can. S.C.R. 673.

It is wholly unnecessary to go into the history—this sufficiently appears in the judgment of my brother Middleton, above quoted.

It is admitted, and indeed it could not be successfully denied, that this is not a case for a peremptory writ—consequently the appeal must succeed.

Even if we had the power to accede to the request of the respondent to grant leave for the appeal to be considered and dealt with as if an action had been brought and the mandamus granted therein, we should not exercise it.

The appeal should be allowed with costs throughout—but without prejudice to any action the respondent may be advised to bring.

LATCHFORD, C.J.:—I agree in the result.

MIDDLETON, J.A.:—I agree with the conclusions arrived at by the other members of the Court.

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Orde, J.A.

ORDE, J.A.:—This appeal must be allowed upon the simple ground that the relief sought by the respondent cannot be obtained summarily by way of an originating motion, but must be sued for in an action commenced by writ of summons.

The respondent, as a mortgagor of certain lands, desiring to redeem the mortgage, wishes to assert the right given to a mortgagor by sec. 2 of the Mortgages Act, R.S.O. 1927, ch. 140, when paying off a mortgage, to have it assigned to a nominee instead of taking a reconveyance. The appellant, the mortgagee, refuses to execute the desired assignment. Whether or not a mortgagee is bound to do so at the request of one of two mortgagors, without the concurrence of the other mortgagor, may be a nice question to be determined in proceedings properly launched. The sole question here is whether the respondent is entitled in these proceedings to obtain a mandatory order compelling the appellant to assign the mortgage.

It is, of course, clear that the case is not one for the issue of an order in the nature of a prerogative writ of mandamus. The respondent is seeking to enforce a mere private right based upon contract. Where is any power given to the Court to grant any such relief in a summary proceeding?

There is nothing in the Mortgages Act or in any other statute conferring any such power. But the respondent contends that the power is given by Rule 622, which provides that “mandamus, prohibition, and *certiorari* may be granted upon a summary application by originating notice.”

I do not think it is necessary to repeat what was said by the late Chancellor and by my brother Middleton in *Rich v. Melancthon Board of Health*, 26 O.L.R. 48. Those judgments explained quite clearly the distinction between the power to grant relief against a public body by the former process of a prerogative writ of mandamus, which could be obtained by means of a summary application without the issue of a writ of summons, and the power to enforce a private right by means of a mandatory order, which could be granted only in an action commenced by writ of summons. The mandatory order is no more than a species of injunction.

Counsel for the respondent has not referred us to any authority which directly supports his contention that the word “mandamus” in Rule 622 includes a mandatory order to enforce private rights or means anything else than a mandamus in the nature of the former prerogative writ. There is nothing in Rule 622, though its language is not identical with the former Consolidated

Rule 1080, to justify the suggestion that the practice as laid down in the *Rich* case had been changed so that a mandamus other than one in the nature of the prerogative writ, or, in other words, a mandatory order to enforce a private right, could be granted except in an action commenced by writ of summons.

Carried to its logical conclusion, this argument would introduce into our procedure by originating notice, actions for specific performance of contracts for the sale of land and any other claim when the relief sought included the right to a judgment of a mandatory character.

Reference was made to a statement in the judgment in *Bank of New South Wales v. O'Connor*, 14 App. Cas. 273, at p. 283, to the effect that the right to pay off a mortgage and to get re-delivery of the mortgagor's title-deeds might be enforced upon a summary application. But I do not read this as meaning that the mortgagor could obtain this relief by an originating notice but merely by launching a summary motion after issuing his writ or filing his bill for relief and so instituting his action in the customary way.

Nor are those cases applicable in which the Court has permitted a plaintiff, who endeavoured to get relief in an action commenced by writ of summons when he should have moved summarily for the prerogative mandamus, to convert his proceedings into a summary motion. It is one thing to allow an ordinary action to be turned into a summary motion, upon the principle that "the greater includes the less," and quite another to grant relief summarily when the practice entitles the defendant to go down to trial upon pleadings and *vivâ voce* evidence.

The judgment of this Court in *Re Patterson*, 62 O.L.R. 255, cited by counsel for the respondent, does not apply. There is no provision in the Mortgages Act to the effect that the Court may order a recalcitrant mortgagee to execute an assignment under sec. 2. Resort to the Courts to enforce the right given by sec. 2 must therefore be had through the ordinary medium of an action commenced by writ of summons. In the absence of some such provision in the Mortgages Act or in the Rules, the respondent here cannot obtain the mandatory order she desires without first issuing a writ of summons in what is in substance an action for redemption.

The appeal must be allowed and the mandatory order be set aside, with costs both here and below.

MASTEN, J.A.:—I agree.

*Appeal allowed.*

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## [APPELLATE DIVISION.]

1928.

SWITZER V. CITY OF OTTAWA.

Oct. 19.

*Master and Servant—Injury by Negligence of Fellow-servant to Volunteer Taking Place of another Servant—Refusal of Workmen's Compensation Board to Award Compensation—Action by Volunteer against Master—Doctrine of Common Employment—Abolition—Exclusion of Jurisdiction of Courts.*

The plaintiff, who was not employed by the defendants, assumed the duty of one of their regular employees, and attended with his own team of horses and proceeded to draw the defendants' snow-plough to a place where it was to be operated. In doing so, the plaintiff was injured. He presented a claim for compensation for his injury, under the Workmen's Compensation Act, but it was rejected by the Workmen's Compensation Board, upon the ground that he was not an employee of the defendants. He then sued the defendants for damages, alleging negligence on the part of E., an employee of the defendants, who was guiding the plough:—

*Held*, that the plaintiff could have no greater right against the master than the servant whose place he was taking would have had—by voluntarily undertaking to discharge the duty of the servant he could not impose a new or greater liability upon the master.

*Degg v. Midland Railway Co.* (1857), 1 H. & N. 773, followed.

At common law, where the injury is occasioned by the negligence of the fellow-servant in the course of the common employment, the risk is undertaken by the servant as one of the risks incident to his employment, and the master is not liable.

If the plaintiff could be regarded as a fellow-servant of E., yet, having regard to the statutory modification of the common law abolishing the doctrine of common employment, he could not maintain the action, for the servant is now entirely deprived of his right of action, and has only the right to claim compensation by application to the Board; and from the decision of the Board there is no appeal.

APPEAL by the Corporation of the City of Ottawa, defendants, from the judgment of McEvoy, J., who tried the action without a jury, in favour of the plaintiff for the recovery of \$1,350 and costs in an action for damages for an injury sustained by the plaintiff by being struck by the defendants' snow-plough, operated by their servant, one Endicott, to which was attached a team of horses owned and driven by the plaintiff, who had voluntarily substituted himself and his team for the man and team regularly employed by the defendants. The plough, when in course of removal from the place where it was kept, swung round and broke the plaintiff's leg.

October 4. The appeal was heard by LATCHFORD, C.J., MIDDLTON, MASTEN, and ORDE, JJ.A.

F. B. Proctor, K.C., for the appellants, argued that the evidence shewed that the plaintiff, at the time of the accident, was



not a servant or an employee of the appellants, but a mere volunteer, and therefore there was no contractual relationship between the plaintiff and the appellants, and the former could not recover against the latter: *Makoney v. City of Guelph* (1918), 43 O.L.R. 313; *Hayward v. Drury Lane Theatre Ltd. and Moss' Empires Ltd.*, [1917] 2 K.B. 899; *Degg v. Midland Railway Co.* (1857), 1 H. & N. 773; *Stuart v. Pennant School District*, [1927] 2 D.L.R. 940.

*A. E. Fripp*, K.C., for the plaintiff, respondent, contended that the appellants were guilty of operating a defective system in taking a short cut in getting the plough into position, and that this amounted to negligence for which they were liable: *Algoma Steel Corporation Ltd. v. Dubé* (1916), 53 Can. S.C.R. 481. The evidence also shewed that Endicott, the appellants' ploughman, under whom the respondent was working, was negligent in not giving proper guidance to the plough, and that this neglect was the cause of the respondent's injury, for which the appellants were liable.

October 19. The judgment of the Court was read by MID-  
DLETON, J.A.:—An appeal by the defendants from the judgment of Mr. Justice McEvoy pronounced on the 26th July, 1928, awarding the plaintiff \$1,350 damages sustained as the result of an accident.

The material facts in this case are undisputed. The Corporation of the City of Ottawa owns a snow-plough used for the purpose of removing snow from the sidewalks of the city. This is drawn by a team of horses. The city corporation employed one Smith, the owner of a team, and it was his duty, when required by the ward foreman, to attend with his team and draw the plough over the prescribed "beat." For its due operation the plough requires to be guided by a ploughman. One Endicott was employed by the city to act as ploughman. On a certain day, Smith, desiring to use his team for some other purpose, requested Switzer to take his place with his (Switzer's) team. Switzer, therefore, attended at Smith's yard, where the plough was kept, met Endicott and proceeded to remove the plough. In the course of the removal of the plough from the yard or shortly after its removal, and before it had reached the place where the operation on the sidewalk was to commence, an accident happened. The plough swung round and the plaintiff's leg was broken. Switzer thereupon presented a claim under the Workmen's Compensation Act, but this was rejected by the Workmen's Compen-

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sation Board, upon the ground that Switzer was not an employee of the city and therefore was not entitled to compensation. Switzer now sues for damages, and at the trial judgment was given in his favour.

I am afraid this judgment cannot stand. The very thing that disentitled Switzer, in the opinion of the Compensation Board, to obtain compensation, precludes his recovery against the master. Switzer was not an employee or servant of the city, he was a volunteer undertaking to discharge for a servant the duty of the servant in the course of his employment. He can have no greater right against the master than the servant whose place he was taking would have had. By voluntarily undertaking to discharge the duty of the servant, he cannot impose a new or greater liability upon the master. This was so held in *Degg v. Midland Railway Co.*, 1 H. & N. 773. See also *Potter v. Faulkner* (1861), 1 B. & S. 800; *Bass v. Hendon Urban District Council* (1912), 28 Times L.R. 317. At common law, where the injury is occasioned by the negligence of the fellow-servant in the course of the common employment, the risk is undertaken by the servant as one of the risks incident to his employment, and the master is not liable. This rule has been applied to one voluntarily assisting in the employment, as the plaintiff here.

If this rule should now be modified so as to place the volunteer in the same position as a fellow-servant, yet, having regard to the statutory modification of the common law abolishing this doctrine of common employment, this would not help the plaintiff in this Court, for the servant is now entirely deprived of his right of action in the Courts and must rely upon the right of compensation, which can only be accorded him by the Compensation Board. I regret that the Board has taken the narrow view that such a volunteer does not come within the scope of the Act, but upon all such questions the Board is supreme and there is no appeal.

The appeal must, therefore, be allowed, and the action dismissed.

*Appeal allowed.*

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## [APPELLATE DIVISION.]

PAFFARD V. CAVOTTI.

1928.

Oct. 19.

*Damages—Injury to Land by Trespasser—Measure of Damages—Depreciation in Selling Value—Quantum—Enhancement by Violent and Arrogant Conduct—Finding of Trial Judge—Evidence—Appeal.*

A city corporation, constructing a sewer, expropriated an easement over the plaintiff's land for that purpose. The defendant contracted with the corporation to construct that part of the sewer which ran through the plaintiff's land. In performing his contract, the defendant did not confine himself to that part of the land which was subject to the easement, but unlawfully cut down trees and deposited sand and silt upon the land outside of the part subject to the easement, and thereby depreciated the value of the land.

In an action for damages in respect of the injury done to the land, the trial Judge assessed the plaintiff's damages at \$4,500, estimating the actual damage which flowed from the defendant's wrong-doing at \$3,500; but, taking into account the defendant's whole course of conduct and persistence in the wrong which he was doing, fixed the total damages at \$4,500:—

*Held*, upon appeal, having regard to the evidence, and to the fact that the measure of damages is not the sum necessary to restore the property, but the depreciation in its selling value, that the finding of \$3,500, for the actual damage done, could not be said to be clearly wrong.

*Held*, also, that the amount of damages in such an action as this may be indefinitely enhanced by evidence of violent and arrogant conduct on the part of the defendant; and, although damages cannot be given separately in respect of such injuries, a jury may take them into account in awarding damages for the wrong done.

The cases cited in Mayne on Damages, 10th ed., p. 432, note (p), and in Halsbury's Laws of England, vol. 10, pp. 641, 642, and especially *Davis v. Bromley Urban District Council* (1903), 67 J.P. 275, followed. And the assessment of the damages at \$4,500 was affirmed.

AN appeal by the defendant from the judgment of LOGIE, J., the trial Judge, in favour of the plaintiff for the recovery of \$4,500 in an action for damage done by the defendant to lands of the plaintiff.

The defendant was a contractor and had a contract with the Corporation of the City of Toronto for the construction of part of a sewer through the plaintiff's lands. The corporation had expropriated an easement; but the defendant did not confine himself to the part of the lands covered by the easement, and conducted his operations in such a way as to damage the lands.

The trial Judge estimated the plaintiff's actual damage at \$3,500, and added \$1,000 as punitive or exemplary damages, on account of the high-handed conduct of the defendant.

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October 4 and 5. The appeal was heard by LATCHFORD, C.J., MIDDLETON, MASTEN, and ORDE, JJ.A.

*J. R. Cartwright*, for the appellant. The learned trial Judge erred in awarding \$1,000 punitive or exemplary damages in addition to compensatory damages which he had already allowed at what he stated to be "the liberal figure" of \$3,500. There is no reported case in which an award of a separate and distinct sum as punitive damages has been allowed, although, admittedly, where the conduct of a defendant has been wilful and high-handed, this may be taken into account in assessing the damages to which the plaintiff is entitled. The proper principle is laid down in *Emblen v. Myers* (1860), 30 L.J. Ex. 71, at p. 74. See also *McArthur & Co. v. Cornwall*, [1892] A.C. 75; *Dreyfus v. Peruvian Guano Co.* (1889), 42 Ch. D. 66, at p. 74, citing with approval the judgment of Bowen, L.J., in *Williams v. Peel River Land and Mineral Co. Ltd.* (1886), 55 L.T.R. 689. In any event, in the case at bar, punitive damages should not have been given, as admittedly the lands injured where leased to a tenant, and the plaintiff was not in possession. The tenant only would be entitled to the benefit of exemplary damages which are given in actions for trespass. The landlord has no right to sue in trespass: Halsbury's Laws of England, vol. 27, p. 851, para 1498; Foa on Landlord and Tenant, 5th ed., p. 20; *Williams v. Bosanquet* (1819), 1 Brod. & Bing. 238; *Harrison v. Blackburn* (1864), 17 C.B.N.S. 678; *Torrence v. Irwin* (1797), 2 Yeates (Penn.) 210. In this case the appellant has already suffered the costs of some seven or eight interlocutory applications and been placed in custody for a time. The plaintiff's conduct has not been beyond criticism. The fact of the tenancy and the tenant's permission to the appellant to use the land in question was withheld by the plaintiff from the Court. These are proper matters to be considered in deciding whether punitive damages should be given: *McArthur & Co. v. Cornwall*, *supra*. The learned Judge had already considered the appellant's conduct in fixing the "compensatory" damages at "a liberal figure." The learned trial Judge erred in holding that there was no duty upon the plaintiff to minimise his damages. The learned Judge appears to have held the view that the rule that a plaintiff is under a duty to minimise his loss is confined to cases of breach of contract and does not extend to actions in tort. This is not the law—see Halsbury's Laws of England, vol. 27, p. 490, para. 960; and vol. 10, pp. 309 and 311, paras. 569 and 573; 3 C.E.D. (Ontario), p. 458, para. 72; *Bateman v. County of Middlesex* (1911), 24 O.L.R. 84, 25 O.L.R.



137; varied on other grounds (1912), 27 O.L.R. 122. The evidence shews that the plaintiff refused to avail himself of opportunities to reduce his loss. The learned trial Judge erred in holding that the measure of damages is necessarily the depreciation in the selling value of the injured land, and not the cost of restoration. *Jones v. Gooday* (1841), 8 M. & W. 146, and all other cases cited in Halsbury, vol. 10, p. 341, paras. 627, 628, to support this proposition, are cases where the cost of restoration would have exceeded the depreciation in selling value. The true principle to be deduced from these cases is that the measure of damages is the depreciation in selling value or the cost of restoration, whichever is the lesser. If this is so, the learned Judge erred in excluding evidence as to the cost of restoration. In any event such evidence would be relevant as tending to shew the amount of depreciation in value, and should have been admitted. For these reasons a new assessment of damages should be directed. On the evidence the amount of damages allowed was excessive.

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At the conclusion of the argument for the appellant, THE COURT reserved judgment, without calling on *Norman Sommerville*, K.C., and *F. A. A. Campbell*, who appeared for the respondent, intimating that if it were found necessary to hear them, they would be notified.

October 19. The judgment of the Court was read by MASTEN, J.A.:—Appeal from the judgment of Mr. Justice Logie, dated the 8th June, 1928, by which the Court ordered and adjudged that the plaintiff do recover from the defendant the sum of \$4,500.

The action is brought for damage done by the defendant Cavotti to certain lands owned by the plaintiff. Cavotti is a contractor. In 1928, the Corporation of the City of Toronto, acting under the powers conferred upon it by the Municipal Act, was constructing a sewer through the lands in question, and in so doing expropriated an easement over the plaintiff's lands for that purpose. The defendant Cavotti contracted with the city corporation for the construction of that part of the sewer in question which ran through the plaintiff's lands. In fulfilling his contract the contractor failed to confine himself to the lands covered by the easement which had been expropriated by the city, unlawfully cut down certain trees, deposited sand and silt over the property owned by the plaintiff, and depreciated its selling value. The

App. Div. land in question is situate in the city of Toronto, and consists of  
1928. about six acres, part of it being high land and part of it being  
PAFFARD a ravine through which a stream ran. The property was under  
v. lease at the time when the occurrences in question took place; but  
CAVOTTI. the lease contained provisions whereby upon a sale of the prop-  
Masten, J.A. erty the tenant undertook on very short notice to give up pos-  
session to the plaintiff or his vendee.

The contention of the plaintiff is well expressed in the evidence of the witness G. Gibson, called as an expert on behalf of the plaintiff. He estimates the damage which the plaintiff suffered in the selling value of his property at \$6,500, and in stating the grounds for that estimation he says: "The whole thing has been damaged, because I do not think anybody would build a decent house up there now, the way it looks to-day. That is the reason I think it has been severely damaged. The cutting of the trees, and cutting of the bank, and diverting the stream, has taken away the natural beauty of the spot; anything you might make now will be partly artificial, you would not have it as it was before the damage." And again he says: "Serious damage to the whole property is the trees and bank. Leaving the bank out—it has nothing to do with me—the trees are very serious. Taking the trees the way I am told the trees were, I think the damage would be around \$4,000 to \$5,000. I think the trees on the property, nine or ten large ones, and a lot of small ones, were worth about \$5,000." And again: "It is only the trees and river and natural beauty that makes this property." Again he says:—

"Q. You have made an estimate of approximately \$6,500?

A. Yes. I told his Lordship it was a very hard thing to make that statement.

"Q. You do not pretend, as a matter of fact, that it is based on any very certain foundation? A. It is based on this: the difference in the entire value if bought to-day and before anybody went on at all. I have been asked to divide how much the city did and how much Cavotti did, and it is awfully hard to differentiate.

"Q. May I suggest that it is more or less guess-work? A. It is an apportionment. I have tried to be fair and honest. There is nothing I can base it on.

"Q. It is more or less a rule of thumb. A. I am trying the best I can; it is the hardest thing I have ever been asked."

The other witness for the plaintiff, H. L. Rogers, estimated the damage done by the defendant Cavotti to the property at \$10,000. Both these estimates were made having regard to the

situation that existed after the city had legitimately expropriated its easement, and do not embrace the damage done to the property by that expropriation.

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The trial Judge, with this evidence before him, has in his reasons for judgment estimated the actual damage which naturally flowed from the defendant's wrong-doing at \$3,500; but, taking into account the defendant's whole course of conduct and persistence in the wrong which he was doing, he has fixed the total damages under all the circumstances at \$4,500, for which sum the judgment is entered.

Two main questions arise in the consideration of this appeal. First, it being admitted that a sum of not more than \$1,300 would adequately cover the expense of restoring the property to its former condition *so far as it can be restored*, and that the principal things which physically cannot be restored are nine large trees and certain small trees which were cut down by the appellant, he contends that the finding of the learned trial Judge of \$3,500 for the substantive or actual damage done by the appellant is excessive. Having regard to the evidence to which I have already referred and to the fact that the measure of damages is not the sum necessary to restore the property, but that the true measure is the depreciation in its selling value, and having regard to the evidence given by the witnesses for the plaintiff and by the witnesses for the defendant, I am quite unable to say that the finding of the trial Judge in regard to the quantum of damage is incorrect. Possibly I might not have made the same finding if I had been the trial Judge, but that is nothing to the point. The question is, can I on the evidence before me say that the trial Judge was clearly wrong in his finding in this regard? I am wholly unable to make any such finding on this appeal.

The other point presents more difficulty. It is well settled law that generally speaking only such damages are recoverable as are the natural and probable result of the wrongful act done by the defendant. But, as pointed out in Halsbury's Laws of England, vol. 10, pp. 641 and 642, para. 628, the operation of this rule is obscured, in its application to actions of this character, by the fact that the amount of damages in such an action may always be indefinitely enhanced by evidence of violent and arrogant conduct on the part of the defendant; and, although damages cannot be given separately in respect of those injuries as such, yet a jury may take them into account in awarding damages for the wrong done.

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Mr. Cartwright's argument in the present case is that the trial Judge was entirely unwarranted in law in his finding that \$1,000 should be added to the \$3,500 on account of the arrogant and improper conduct of the defendant towards this plaintiff.

In my opinion, every intendment is to be made in favour of this judgment. No valid objection could be made to the judgment if the Judge had simply said in his reasons that, taking all the facts into consideration, he fixed the damages at \$4,500. The circumstance that the trial Judge, in giving his reasons, thought aloud and expressed in words his method of arriving at the \$4,500, cannot in my opinion prejudice the validity of the resulting judgment. To hold otherwise would be to give effect to technical formality as against the substantive and real rights of the case, and under our rules I think that it is our duty as an appellate court to uphold the judgment where no real injustice has resulted. I am therefore of opinion that, notwithstanding the very careful and elaborate argument which was addressed to us by Mr. Cartwright, this appeal must be dismissed with costs.

I refer particularly to the cases cited in Mayne on Damages, 10th ed., p. 432, note (p), to Halsbury *loc. cit.*, and particularly to the case of *Davis v. Bromley Urban District Council* (1903), 67 J.P. 275.

*Appeal dismissed with costs*

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[WRIGHT, J.]

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Oct. 22.

KEMP V. BEATTIE.

*Mortgage—Foreclosure—Judgment—Practice—Reserving Day for Infant Defendants to Shew Cause—Judicature Acts and Rules—Rule 2 of Rules of 1913.*

It is not now necessary in a judgment for foreclosure that a day should be reserved for an infant defendant to shew cause.

The question whether it is necessary is a question of practice or procedure, and not of legal right.

The effect of Rule 2 of the Rules of 1913 is to make those Rules a complete code of procedure, either by special provisions or by analogy, and the practice in England no longer obtains in Ontario.

Here the rights of infants are protected and represented by the Official Guardian, who in foreclosure actions has the right to ask for a sale by the Court in case he deems it in the interest of the infant, while in England no official is vested with the like powers.

Review of the decided cases and of the provisions of the several Judicature Acts of Ontario and the Rules made thereunder.



MOTION by the plaintiff for judgment for foreclosure in a mortgage action.

There were both adult and infant defendants. The Official Guardian had filed a statement of defence submitting the infants' rights to the Court, and as against the infants the motion was made under Rule 222. As regarded the adults, against whom the pleadings had been noted as closed, the motion was made under Rule 356 (1).

October 18. The motion was heard by WRIGHT, J., in the Weekly Court, Toronto.

*H. Howitt*, for the plaintiff.

*McGregor Young*, K.C., Official Guardian, for the infant defendants.

October 22. WRIGHT, J.:—On the hearing of the motion the question was raised as to the right of the infant defendants to have a day reserved to them to shew cause against the judgment after attaining twenty-one years of age.

As there does not appear to be uniformity of practice throughout the Province in regard to foreclosure actions where infants are concerned, it is desirable that the practice should be settled, and with that object in view I have endeavoured to trace the history of the practice in such cases, and to ascertain its applicability under the present Rules of Practice.

In England the practice appears to be that the judgment of foreclosure should contain a clause to the effect already stated. See Daniell's Chancery Practice, 8th ed., p. 1223, although in a case there cited it is stated that where an immediate foreclosure is for the benefit of the infant such a clause may not be inserted.

The courts in this Province adopted the English rule in *Mair v. Kerr* (1850), 2 Gr. 223, although in that case there was a divided court. The last reported case in Ontario appears to be *London and Canadian Loan and Agency Co. v. Everitt* (1881), 8 P.R. 489. In that case the late Chief Justice Spragge, one of the Judges who decided *Mair v. Kerr*, expressed the opinion that owing to legislation the practice should not be followed, but he felt himself bound by the decision in *Mair v. Kerr* and held accordingly.

I think it well at this stage to examine the different statutes and rules of practice dealing with the practice that existed prior to 1881, when the first Ontario Judicature Act was passed.

Section 12 of the Ontario Judicature Act, 1881, provided that where no special provision was contained in that Act or in any

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Wright, J. rules or orders of Court with reference to the jurisdiction of the  
1928. Court so far as regards procedure and practice, it should be  
exercised as nearly as may be in the same manner as the same  
KEMP might have been exercised by the respective existing Courts if  
v. the Act (the Ontario Judicature Act, 1881) had not been passed.  
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There was nothing in the Rules of Practice passed under the authority of the Judicature Act of 1881 which covered the questions raised here. The provisions of sec. 12 already cited were incorporated into the Revised Statutes of 1887, ch. 44, sec. 42, and also into 58 Vict. ch. 12, sec. 138, and R.S.O. 1897, ch. 51, sec. 128, in varying terminology. This last mentioned statute was repealed by 3 & 4 Geo. V. ch. 19, and that statute did not contain any provision similar to sec. 12 of the Ontario Judicature Act, 1881, and thus the former practice was superseded. In the revisions of 1914 and 1927 no similar provisions to those contained in sec. 12 of the Judicature Act of 1881 are to be found, so that there is no statutory authority for continuing the practice or procedure that existed prior to the passing of the Ontario Judicature Act of 1881. I shall cite the various rules dealing with the former practice.

Rule 3 of the Consolidated Rules of Practice, 1888, reads as follows:—

“All rules and orders heretofore passed by any of the Superior Courts of Law or Equity in Ontario or Upper Canada and not included in these rules are rescinded, save and except those mentioned in the schedule hereto, and these rules shall take effect on and after the 1st day of March, 1888. All practice inconsistent therewith is superseded. As to all matters not provided for in these rules, the practice is, as far as may be, to be regulated by analogy thereto.”

The Consolidated Rules of Practice promulgated in 1897 contain Rule 3, which reads as follows: “As to all matters not provided for in these Rules, the practice, as far as may be, shall be regulated by analogy thereto;” and Rule 2 of the present Rules of Practice is to the like effect.

It will be noted that there was an incongruity or inconsistency in the Rules of 1888 as compared with the statutory provisions then in force, R.S.O. 1887, ch. 44, sec. 42. The statutory provisions continue the old practice in cases where the Rules do not expressly provide for the same, whereas the provisions in the Rules purport absolutely to rescind and supersede the old practice and

regulate matters not provided for in the Rules by analogy thereto. This incongruity or inconsistency is perpetuated in the Rules of 1897, which are inconsistent with the provisions of R.S.O. 1897, ch. 51, sec. 128.

In the result, the present practice is to be found in Rule 2, which rescinds all previous practice and declares that as to all matters not provided for in the present Rules the practice shall be regulated by analogy thereto.

I have reviewed the history of the legislation and the Rules of Practice in order to establish the difference between the present provisions and those prevailing in the earlier years under the Ontario Judicature Act. I have examined the Chancery Rules and Orders and have been unable to find any special provision in them dealing with the matters now under review, but it is obvious that the practice followed in England in like cases was adopted by the courts here. I think the effect of Rule 2 and its predecessors is to make the present Rules a complete code of procedure, either by special provisions or by analogy, and that the practice in England no longer obtains here.

A question might be raised as to whether the insertion of such a clause in the judgment is a question of practice or procedure, or is a matter of legal right in the infant defendants. I am of opinion that it falls under the former category.

Rule 489 fixes the time allowed for redemption in judgments for foreclosure, and the matter is thus dealt with as a question of practice. In my view the time allowed for an infant to redeem or to shew cause is by analogy a question of practice or procedure and does not arise by reason of any legal right in the infant.

It might be well to note that the same reason for the rule or practice does not exist here as in England.

Here the rights of the infant are protected and represented by the Official Guardian, who in foreclosure actions has the right to ask for a sale by the Court in case he deems it in the interest of the infants, while in England, there is no official vested with the like powers.

My conclusion upon review of the statutes and rules is that the practice introduced here from England in such cases no longer obtains and that it is not necessary in judgments for foreclosure that a day should be reserved for the infant to shew cause.

The question under discussion arose in *Scottish Manitoba Investment and Real Estate Co. v. Blanchard* (1885), 2 Man. L.R. 154, where Mr. Justice Taylor held that the practice in England

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Wright, J. was not introduced into the Province of Manitoba, and in his judgment followed the dissenting judgment of Chancellor Blake in  
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*Mair v. Kerr.*

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 There will be judgment in this action for foreclosure in the usual terms, without reserving a day for the infant defendants to shew cause.

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[ORDE, J.A.]

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Oct. 30.

*Will—Appointment of Executors and Trustees—Direction that they be Governed by Advice of Named Person in Relation to Disposition of Shares in Company—Conduct of Adviser—Conflict between Duty and Interest—Power of Court to Declare that Trustees may Act without Advice from him—Rule 600—Trustee Act, R.S.O. 1927, ch. 150, sec. 59(1)—Declaration Made as Sought—Costs.*

By his will the testator vested his whole estate in a trust company as his executors and trustees, upon trust for conversion and investment, for payment of debts, etc., and legacies, to set aside a sum to provide an income for his wife, and for distribution of the residue among his children, the portions of his daughters not to be paid until they should reach a certain age. By para. 13 of the will, the testator directed that, notwithstanding that he had given his executors and trustees authority to administer his estate as they in their discretion should see fit, they should at all times consult with and be governed by the advice of his son-in-law, B., "in all matters relating to my investment in" a named assurance company, "and I release my said executors and trustees from all liability for any action that may be taken at the request of my said son-in-law." The executors and trustees, by a motion upon originating notice, made eight years after the death of the testator, submitted to the Court the question whether or not, having regard to events which had happened, they ought to be declared entitled to deal with the investment mentioned without further consultation with B.:

*Held*, that the Court had power, under Rule 600 (e), (g), and (h), and sec. 59 (1) of the Trustee Act, R.S.O. 1927, ch. 150, to determine the question.

The sole duty of B. under the will was to assist the trustees; his power must be used reasonably and not arbitrarily; and, it appearing that his interest conflicted with his duty, his advice ceased to be of value to the estate.

The testator being dead, the Court is empowered, when the benefit of the estate requires it, to do what it believes a prudent testator would do if alive, and to revoke a direction which had nothing to do with the destination of the estate but merely with its administration.

Four out of five beneficiaries wishing the trustees to be freed from the control and interference of B., it should be declared that the trustees ought to be allowed to dispose of the shares in the company



without consulting B. and free from any further right or power in him to control or direct the administration of the estate in respect thereof. 1928.

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Remarks upon the anomalous position of B. under the will and his conduct in regard to the shares.

MOTION by the National Trust Company Ltd., executors and trustees under the will of Elias Rogers, deceased, upon originating notice, for the advice and direction of the Court in regard to a question arising in the administration of the estate.

October 11. The motion was heard by ORDE, J.A., in the Weekly Court, Toronto.

*Glyn Osler*, K.C., for the applicant company.

*R. H. Parmenter*, K.C., for Sarah P. Whitcomb, Martha H. Angstrom, Isabella M. McLaughlin, and John W. Rogers, beneficiaries.

*R. S. Robertson*, K.C., for Alexander H. Beaton and also for Mary Beaton, a beneficiary.

*J. M. Baird*, for the Official Guardian, representing the infant children of Martha H. Angstrom and of Isabella M. McLaughlin.

October 30. ORDE, J.A.:—The National Trust Company, as the sole executor and trustee under the will of the late Elias Rogers, moves under Rule 600 for the advice of the Court as to whether, under the circumstances disclosed in the affidavit of H. V. Laughton, its assistant estates manager, and the exhibits thereto, the trust company should continue to consult with and be governed by the advice of Alexander H. Beaton in connection with the sale of the shares of the National Life Assurance Company of Canada, forming part of the estate of the testator, pursuant to the direction contained in para. 13 of the will.

Elias Rogers died on the 11th April, 1920, leaving a will dated the 6th December, 1919. By it, the whole estate is vested in the National Trust Company as his executors and trustees, upon trusts for conversion and investment and for payment of debts, etc., and of numerous legacies to relations and to charities. There are also some specific legacies of personalty. The residue, after a valuation thereof for the purposes of division, is as to one-tenth thereof to be set aside to provide an income for his wife during widowhood, and as to the remaining nine-tenths, including the remainder of the one-tenth dependent upon the widow's life interest, to be divided among certain of his children, who are the adult beneficiaries represented on this motion, with special pro-

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RE ROGERS.      visions as to the bringing into hotchpot of certain advances made to such children by the testator in his lifetime and as to the application of certain insurance moneys in calculating their respective shares. The share given to each of the four daughters is not to be paid or transferred to her until she attains the age of 45 years, with provision for the surviving children of any such daughter dying under that age. Mrs. Whitcomb and Mrs. Beaton have reached the age of 45. The other two daughters, Mrs. Angstrom and Mrs. McLaughlin, have not.

Paragraph 13 of the will is as follows:—

“Notwithstanding that I have in this my will given my executors and trustees authority to administer my estate as they in their discretion think fit, it is my wish that my son Alfred S. Rogers and my son-in-law Alexander H. Beaton, or the survivor of them, be consulted with regard to all important matters in connection with the administration of my estate. I further direct that my said executors and trustees shall at all times consult with and be governed by the advice of the said Alexander H. Beaton in all matters relating to my investment in the National Life Assurance Company of Canada and I release my said executors and trustees from all liability for any action that may be taken at the request of my said son-in-law.”

It is the second part of this paragraph which gives rise to the present motion, and the simple question is, whether or not, having regard to the events which have happened, the trustees and executors ought to be declared to be entitled to deal with the investments mentioned without any further consultation with Alexander H. Beaton and free from his control; and there is the further question, raised by counsel for Mr. Beaton, whether or not the Court has power so to declare upon a summary motion of this character.

It will be simpler to dispose of the second question before dealing with the merits of the motion.

The situation is of course unusual, but this is merely because a provision in a will directing that the executors and trustees shall be “governed by the advice of” one who is neither a beneficiary nor a trustee or executor himself, and who occupies no other position of a fiduciary character whatsoever towards the estate, and is consequently under no responsibility to the estate or its beneficiaries, is itself quite out of the ordinary. But it cannot be that one who is not a trustee and who has no interest whatever in the estate can occupy a position superior to that of a trustee or that

the power given to Mr. Beaton by the will can hamper the wide powers of the Court under Rule 600.

There are three branches of that rule, any one of which, I think, is wide enough to give jurisdiction, namely:—

“(e) Directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees.”

“(g) The opinion, advice or direction of a Judge pursuant to the Trustee Act.

“(h) The determination of any question arising in the administration of the estate or trust.”

Section 59(1) of the Trustee Act, R.S.O. 1927, ch. 150, provides for a summary application by a trustee for the opinion, advice or direction of the Court “on any question respecting the management or administration of the trust property.”

Upon the trust company here devolves the full responsibility for the management and administration of the estate. When called to answer for their administration of that part of the estate invested in the National Life Assurance Company, they could doubtless be protected if they honestly and in good faith followed the advice and direction of Mr. Beaton, but to contend that the so-called control over the management of the estate given him can hamper or limit the power of the court to advise the trustees and to give directions for the due administration of the estate is to place Mr. Beaton in the extraordinary and quite unknown position of a sort of super-trustee who is neither responsible to the trustees or the beneficiaries nor subject to the control or direction of the Court. He cannot surely have a status superior to that of a trustee, and if a trustee is subject to be removed by the Court (as he can be on a summary application) the Court is, I think, clothed with full authority under Rule 600 to deal summarily with the question whether or not in the circumstances the trustees are free to proceed with the administration and disposal of the assets in question without the consent or interference of Mr. Beaton.

At his death the testator owned 3,078 shares of the capital stock of the National Life Assurance Company of Canada, which have since increased to 3,172 shares, out of a total issued capital of 10,000 shares. The shares are each of the par value of \$100, but are only paid up as to \$25 each.

On the 2nd July, 1919, a few months prior to the making of his will, the testator entered into a pooling agreement with one Albert J. Ralston and one F. Sparling, who were also shareholders

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Orde, J.A. in the company, whereby, for a period of 5 years, the testator was  
1928. to have "the exclusive right and power to vote on all shares in  
the capital stock" of the company then belonging to any of them  
or that might thereafter be acquired by any of them. It was also  
RE ROGERS. agreed that, if Mr. Rogers should die during the five years, Mr.  
Beaton (who was made a party to the agreement) and Ralston  
should together determine how all such shares should be voted  
during the remainder of the period. There was also given an  
option, in the event of the death of any of these three shareholders,  
to the survivor or survivors to purchase, within a period of one  
year, the shares of the deceased shareholder for \$85 per share.

When the pooling agreement of the 2nd July, 1919, was made,  
Mr. Beaton, in addition to being Mr. Rogers' son-in-law, was the  
solicitor for the National Life Assurance Company, and it is easy  
to understand from the evident confidence reposed in him by  
Mr. Rogers when the agreement was made and from the family  
connection and his position as the company's solicitor why Mr.  
Rogers in making his will thought it in the interest of his estate  
to subject his executors and trustees to the advice and control  
of Mr. Beaton.

There is, however, one important feature in Mr. Beaton's  
relationship to the trust at the death of the testator which must be  
emphasised. Mr. Beaton at that time had no personal interest  
whatever in the assurance company; he was not a shareholder  
nor did he occupy any office in the employ of the company other  
than that of its solicitor. He was, therefore, in a position, when-  
ever called upon to exercise any of the powers and duties given to  
and imposed upon him by para. 13 of the will, to act with a  
single eye to the interests of the estate.

The story of all that has happened since the testator's death  
in April, 1920, is told in all its detail in the affidavits, with the  
accompanying documents and correspondence, filed upon this  
motion. All that is necessary here is to refer to those incidents  
which bring me to the conclusion I have formed.

Shortly after the death of the testator, the trustees trans-  
ferred to Beaton (in trust) 155 shares to qualify him as a director  
of the company and to represent the estate upon its board of  
directors.

On the 31st October, 1922, while the pooling agreement of  
the 2nd July, 1919, was still in force, Mr. Beaton entered into  
a new agreement with Ralston and Sparling for the pooling of  
the shares of Ralston and Sparling and of the Rogers estate for  
a further period of 5 years from that date. In the recital it was



stated that "the said Beaton exclusively controls the shares of the Elias Rogers estate." What this was intended to mean is not clear. Read literally, the statement was not true, though Mr. Beaton may have believed that it was.

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The agreement vested in Beaton for 5 years, if he lived so long, the exclusive right and power to vote all the shares then standing in the names of all these parties. It also gave Beaton the exclusive right, if Ralston and Sparling should die, to purchase the shares of the others so dying for \$65 per share, and if he, Beaton, should die, his personal representatives were to have the right to buy 1,000 shares of Ralston and Sparling for \$65 per share.

The pooling agreement of the 2nd July, 1919, was declared to be cancelled and superseded by this agreement. The trustees were not parties to the agreement, and refused to approve of it. I mention it merely because it indicates an assumption on the part of Mr. Beaton of certain rights and powers over the shares belonging to the estate which he did not, in my judgment, possess under the will.

In or about November, 1922, Beaton received an offer of \$85 per share for the shares of the estate, which he refused without consulting the trustees or even communicating the offer to them, and it was not until a year later that the trustees learned that such an offer had been made. If the present action was based upon that episode alone, I should feel obliged to hold that Mr. Beaton, in not communicating the offer to the trustees for discussion and consideration, had been recreant to the duty imposed upon him by the testator and had shewn himself to be no longer fit to be entrusted with the powers conferred upon him by paragraph 13 of the will.

By the end of 1927. Mr. Beaton had acquired for himself shares of the company to the number of 1,100 or more; and, while it may be true, as Mr. Beaton swears, that Mr. Laughton of the National Trust Company expressed his approval of the purchase, the fact remains that the ownership of this stock and his position as president of the assurance company (to which he had been elected about 2 years before) have in the result been the underlying cause of the friction that has come to a climax in this motion.

As already stated, two of the daughters have reached 45 years of age. All the adult beneficiaries, except Mrs. Beaton, that is, four out of five, desire that the trustees shall sell the shares in question.

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Mr. Laughton says that in February, 1928, it was intimated to the trustees that a responsible purchaser would make an offer of \$100 per share, but the prospective purchaser stipulated that the trustees should not disclose to Mr. Beaton any facts connected with the suggested offer except the amount thereof and the responsible financial position of the purchaser. The trustees later received an intimation from another group of purchasers that they would be prepared to make an offer, but with the same stipulation. Whether or not the fears underlying these stipulations were justified might perhaps at that time have seemed rather fanciful, but it is clear that Mr. Beaton's interest in the company as a shareholder and a director and as its president did make it difficult for prospective purchasers to believe that his interest would not conflict with his duty to the estate, and I think that what happened later indicated that their fears were justified.

Because of the difficulty facing the trustees in dealing with offers for the shares, the trustees applied to the Court for advice, and the matter came before Mr. Justice Rose last April. During the course of the proceedings, the parties entered into an agreement as to the sale of the shares. In substance it was arranged that the shares of the estate and of Mr. Beaton should be sold subject to a reserve price of \$105 per share. The trustees were to circularise possible purchasers asking for offers for some date not later than the 21st April, 1928. It was also agreed that there would be no objection to including other available shares in the offering.

Notwithstanding the explicit terms of the agreement, there appeared to be some difficulty in getting from Mr. Beaton a statement of the exact number of shares held by him. The agreement called for all his shares, but he appears to have tried to withhold some of his shares from those to be offered, and his conduct as to this matter alone discloses such a lack of candour and fair dealing on his part as to justify any lack of confidence in him which the trustees now exhibit. He also raised objections to the inclusion in the shares to be offered of a large block of stock held by a prominent shareholder of the company, though the agreement had expressly permitted this to be done.

Only three tenders were received in response to the circulars. One came from a well-known firm of brokers of \$120 per share for 6,456 shares (the number offered in the circular). This offer imposed certain conditions as to the resignation of the directors and otherwise, and because of the objection of Mr. Beaton thereto the offer was not accepted and was shortly afterwards withdrawn.

Having regard to the fact that the ownership of 6,456 shares (out of 10,000 issued shares) would give the purchasers ultimate control, it was not unreasonable that they should stipulate that the control might be made immediately effective. Mr. Beaton, instead of trying to assist in consummating a sale at a price which at that time greatly exceeded even the expectations of the trustees and Mr. Beaton, declined to approve of the offer, and by simply blocking the negotiations allowed a good offer to be withdrawn.

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The other two offers were: one from Mr. Sparling of \$106.25 for the estate's 3,172 shares, and one from Mrs. Beaton, who made two alternative offers, one of \$572,232 for the 6,456 shares (about \$88 per share) and one of \$106 per share for not less than 5,001 and not more than 5,100 of the shares held by the estate, Beaton, and Sparling.

Then there followed a lot of correspondence between the trustees and their solicitors on the one hand and Mr. Beaton and his solicitors on the other, without anything being accomplished towards effecting a sale of the shares. And accordingly this motion for advice and direction was launched afresh.

Now what is the situation as it is presented to the Court? The shares in question are vested in the trustees, who in that capacity are charged with the duty of converting them into cash and distributing the proceeds among the five persons entitled thereto. Four of the five wish the trustees to be free from any further control by Mr. Beaton; the fifth expressly wishes him to continue in control, but she is his wife and could hardly be expected to be antagonistic to him.

Not only is it evident that Mr. Beaton's personal interest in the company causes prospective bidders to shy off when they learn that he is to consider their bids and may himself come into competition with them, but it is clear that his interest does in fact obscure his judgment and prevents him from acting wholeheartedly in the interest of the estate. How else can the offers from Mrs. Beaton and Sparling be regarded?

Mr. Beaton's frame of mind is revealed by the statement in para. 27 of his affidavit that in entering into the agreement of the 9th April, 1928, for the offering of the shares for sale he "conceded everything that was requested" of him by the trustees. And during the argument his counsel spoke of the "concessions" he had made. What had any "concessions" to do with the matter? Beaton had no interest in the estate, and in that respect could "concede" nothing. If his duty to the estate as a quasi-trustee (I don't know what other technical term to apply to his so-

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called right to control the trustees) required him to adopt a certain course, he had no right to "concede" anything. It was his duty to adhere to his position or resign from the post (whatever it was) that he occupied with reference to the estate. But the truth would appear to be, as might well be expected the moment Mr. Beaton acquired a personal interest in the affairs of the assurance company, that he, perhaps quite unconsciously, became in some way imbued with the idea that, in assenting to any proposal of the trustees which might affect his personal interest, he was making a "concession" to the trustees.

A further insight into Mr. Beaton's attitude towards the estate is given by his answers to the questions put to him during his cross-examination upon his affidavit during the earlier motion. He admits having consulted parties who might become possible purchasers of the shares, but refuses to disclose who they were, taking the ground that until the trustees make full disclosure to him of the transactions they had been conducting without his knowledge he is under no obligation to do so. What right had Mr. Beaton to be conducting negotiations for the sale of the shares at all without the concurrence of the trustees? No such power is given to him by the will. Whatever his right to dictate to the trustees when and how the shares should be sold (and I question whether the words "all matters relating to my investment in the National Life Assurance Company" really go that far), the will gave him no right to usurp the functions of the trustees and carry on negotiations alone.

Throughout his cross-examination he displays such a truculent attitude towards the trustees as to indicate that he has completely lost sight of the fact that his sole duty under the will is to assist the trustees.

All of which shews how important it is that no one should be permitted to continue to perform a trust, and much less to exercise an anomalous power of control with no corresponding responsibilities, where he has placed himself in a position where his interest may conflict with his duty.

Here the only interest which concerns the Court is that of the estate. It is of no consequence what effect the sale of the estate's shares may have upon Mr. Beaton's shares or their value or upon his directorship or presidency. It is idle to point to the language of para. 13 of the will as if it had imposed upon the estate and its administration some iron-bound regulation which could not be varied or set aside. It is argued that that was the



testator's decree. The same argument can be applied to every attempt to dispense with the services of a trustee. A provision of this sort is presumably made by the testator for the benefit of his estate. The testator being dead, the Court is empowered, when the benefit of the estate requires it, to do what it believes a prudent testator would do if still alive, and to revoke a direction which had nothing to do with the destination of the estate but merely with its administration. Here, four out of five beneficiaries wish the trustees to be freed from the control and interference of Mr. Beaton, and I can see no reason why a voice from the grave should, in entirely different circumstances, any longer dictate how what now belongs to the beneficiaries and not to the testator is to be administered.

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The concluding words of para. 13 shew that the testator intended the power given to Mr. Beaton as a protection to his executors and trustees. That being the case, the power must be used reasonably and not arbitrarily. As soon as it became apparent that Mr. Beaton was assuming to exercise the rôle of a dictator his usefulness to the estate was gone.

I am, therefore, of the opinion that the trustees ought to be allowed to proceed to dispose of the shares in question without consulting Mr. Beaton and free from any further right or power in him to control or direct the administration of the estate in respect thereof, and the order will so declare.

As to the costs: I observe that the costs of all parties on the former motion were, by the agreement of the 9th April last, to be paid out of the estate. The present motion has been necessitated wholly by Mr. Beaton's obstructive tactics, which prevented that agreement from being carried out, and I can see no reason why those who have opposed this motion should not pay the costs of it. The order will therefore provide that the costs of the trustees (as between solicitor and client) and those of the four beneficiaries represented by Mr. Parmenter and of the Official Guardian shall in the first instance be paid out of the estate, and that the trustees shall be entitled to recover the costs so paid (their own, however, upon a party and party basis only) from Mr. and Mrs. Beaton.

## [APPELLATE DIVISION.]

1928.

LUMBERS v. FRETZ.

Nov. 2.

*Company—Directors—By-laws—Gratuities for Past Services—Companies Act, R.S.C. 1906, ch. 79, sec. 80 (d)—Shareholders—Notice of Meeting—Proxies—Voting on Shares—Representation of Shares Held in Trust—Action by Minority Shareholders—Status—Estoppel—Costs—Salvage.*

The judgment of WRIGHT, J., 62 O.L.R. 635, was affirmed.

AN appeal by the defendants from the judgment of WRIGHT, J., 62 O.L.R. 635.

November 2. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and ORDE, JJ.A.

A. L. Fleming, for the appellants, argued that the plaintiffs had no status to maintain the action. The shares of stock of Canadian Cannery Limited were not given to the appellants William Fretz, Solomon H. Rittenhouse, and Walter G. Lumbers as gratuities, but for services. It was within the powers of the directors to pass the by-laws in question. The shareholders' meeting at which the by-laws were considered was duly called and held, a quorum was present, and the by-laws were duly ratified. The by-laws were acted upon by the company as well as by the appellants; and the shareholders, including the plaintiffs, acquiesced in them, and are now estopped from objecting to the validity of them. Reference was made to *Township of Barton v. City of Hamilton* (1909), 13 O.W.R. 1118; *Fullerton v. Crawford* (1919), 59 Can. S.C.R. 314; *Bartram v. Birtwhistle* (1908), 15 O.L.R. 634; *Lindley's Law of Companies*, 6th ed., p. 781.

D. L. McCarthy, K.C., and Lewis Duncan, for the plaintiffs, respondents, were not called upon.

LATCHFORD, C.J.:—We are all of opinion that the appeal fails. For my part I am content to adopt the reasons of the learned trial Judge as fully warranting the dismissal of the appeal, which should be with costs on the same basis as they were awarded in the Court below.

*Appeal dismissed.*

## [APPELLATE DIVISION.]

REX v. WILLIAMS.

1928.

Nov. 27.

*Criminal Law—Murder—Trial—Evidence—Insanity—Criminal Code, R.S.C. 1927, ch. 36, sec. 967—Omission of Counsel to Raise Question—Miscarriage of Justice—New Trial.*

At the trial of the accused for murder there was, in the opinion of the Court, evidence which, had the point been taken, would of necessity have raised in the mind of the trial Judge a doubt whether the accused was then, on account of insanity, capable of conducting his defence; but the point was not brought to the attention of the trial Judge, and the course prescribed by sec. 967 of the Criminal Code was not adopted:—

*Held*, that the omission of counsel ought not to deprive the accused of the right given him by the section; and a new trial was directed.

AN appeal by Williams from his conviction, upon trial before KELLY, J., and a jury, upon a charge of murdering his wife.

November 7. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, ORDE, and GRANT, JJ.A.

*A. E. Day*, K.C., and *W. C. Hodgins*, for the appellant.  
*Edward Bayly*, K.C., for the Crown.

November 27. MULOCK, C.J.O., read the following judgment:—On opening the appeal before us, counsel for the accused stated that at the time of his trial the accused was insane, whereupon the question arose whether, if he was then insane within the meaning of sec. 967 of the Criminal Code, the trial Judge should have directed the trial of an issue as to such insanity before his trial for the offence charged. Section 967 is as follows:—

“If at any time after the indictment is found, and before the verdict is given, it appears to the court that there is sufficient reason to doubt whether the accused is then, on account of insanity, capable of conducting his defence, the court may direct that an issue shall be tried whether the accused is or is not then, on account of insanity, unfit to take his trial.”

From an examination of the evidence on the question of such insanity, the majority of the Court are of opinion that at the trial and before verdict there was evidence which, had the point been taken, would of necessity have raised in the mind of the learned trial Judge a doubt and so have brought the case within the provisions of this section.

This point should have been brought to the attention of the learned trial Judge, but was not, and, in consequence, the course

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1928. opinion that the omission of counsel ought not to be allowed to  
— deprive the accused of the statutory right given to him by the  
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WILLIAMS. For these reasons, we think his conviction amounted to a mis-  
Mulock, carriage of justice and should be quashed and a new trial  
C.J.O. ordered.

*Order accordingly.*

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[APPELLATE DIVISION.]

1928.

RE CRAIG.

Oct. 10.

*Husband and Wife—Joint Tenancy of Lands—Execution against Lands  
of Husband—Sale of Interest of Husband—Severance of Joint  
Estate—Right of Purchaser to Order for Partition or Sale.*

Lands were conveyed to a man and his wife as joint tenants, and not  
as tenants in common:—

*Held*, that, estates by entireties having been abolished, the joint estate  
was severable; and the interest of one joint tenant could be sold  
under execution.

An order made, on the application of the purchaser at a sheriff's sale  
of the interest of the husband, for partition or sale, was affirmed.

ON the 25th May, 1921, John Andrew conveyed the west half  
of lot 21 in the 4th concession of the township of Moore, in the  
county of Lambton, to Henry Craig and Annie Gregory Craig,  
his wife, as joint tenants, and not as tenants in common, subject  
to a mortgage.

Under a writ of execution in the Supreme Court of Ontario,  
dated the 14th December, 1926, for \$109.50 costs, which had  
been awarded to Frank E. Littleproud, plaintiff, in an action  
against Henry Craig for damages for breach of an agreement  
to sell the said lands, the Sheriff of the County of Lambton sold  
at public auction on the 19th April, 1928, for \$100, to A. Weir,  
“an undivided half share or interest and all other the right, title,  
interest, and equity of redemption of the said defendant Henry  
Craig in, to, and out of” the lands above referred to, and by deed  
dated the 20th April, 1928, conveyed Henry Craig's interest to  
Weir. Mrs. Craig was not a party in the action of Littleproud  
v. Craig.

Weir, on the 10th May, 1928, moved before the Local Judge  
at Sarnia for an order for partition or sale of the lands so as



to effect a severance, and an order for partition or sale was made on the 15th May, 1928. From this order Annie Gregory Craig appealed, and the appeal, coming before FISHER, J., in Chambers, on the 23rd, May, 1928, was dismissed with costs. 1928.  
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From the order of FISHER, J., Mrs. Craig appealed to the Appellate Division.

October 9. The appeal was heard by MULLOCK, C.J.O., MAGEE, HODGINS, and GRANT, JJ.A.

*Lyle Ramsey*, for the appellant, argued that the lands in question were held in joint tenancy by Henry Craig and his wife Annie Craig, and that Weir, the purchaser at the sheriff's sale, had not acquired any interest or right so as to sever the joint tenancy, and he was therefore not entitled to partition or sale. The joint tenancy could not be severed by operation of law, that is to say, by an attempted sale under an execution against Henry Craig in an action to which his wife was not a party; and the sheriff did not convey any interest in the land which would destroy the joint tenancy. Until the joint tenancy was converted into a tenancy in common it was not exigible. The interest of Henry was not such an interest as is referred to in sec. 9 of the Conveyancing and Law of Property Act, R.S.O. 1927, ch. 137, or sec. 34 of the Execution Act, R.S.O. 1927, ch. 112. Reference to *Griffin v. Patterson* (1881), 45 U.C.R. 536, especially at p. 549. A joint estate between husband and wife would be the same as an estate by entireties, and such an estate was not exigible at common law. Reference to *Armour on Titles*, 4th ed., pp. 434 and 447; *Spring v. Kinnee* (1928), 62 O.L.R. 562; *Halsbury's Laws of England*, vol. 24, pp. 386 to 391; *In re Butler's Trusts* (1888), 38 Ch. D. 286, especially at p. 293.

A. Weir, K.C., the respondent, contended that partition or sale had been properly ordered. The joint estate was severable, and the joint interest of one joint tenant could be sold under an execution. This had long been the law: *Coke on Littleton*, Part I., vol. 2, p. 184 (b), sec. 286; *Lord Abergavenny's Case* (1607), 6 Co. Rep. 78 (b); *Hills v. Webber* (1901), 17 Times L.R. 513. In *Spring v. Kinnee*, *supra*, another Divisional Court has disposed of the contention that husband and wife now take by entireties, by deciding that estates by entireties have been abolished by the Married Women's Property Act. Reference to *Re Wilson and Toronto Incandescent Electric Light Co.* (1891), 20 O.R. 397.

[The argument was not completed when the Court adjourned till the following day.]

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October 10. THE COURT intimated that it was unnecessary to hear counsel for the respondent further, and called on counsel for the appellant, who said that he had nothing to add to his opening argument.

THE COURT dismissed the appeal, holding that the joint estate was severable, and the interest of one joint tenant could be sold under an execution.

*Appeal dismissed with costs.*

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[APPELLATE DIVISION.]

LUNG v. LEE.

1928.

Nov. 16.

*Judgment—Action on Judgment of Quebec Court—Foreign Judgment—Principles of International Law—Defendant Domiciled and Served in Ontario not Appearing—Cause of Action—Defence to Action Brought in Ontario—Judicature Act, R.S.O. 1927, ch. 88, secs. 51, 52—Acts of Province of Canada, 22 Vict. ch. 5, sec. 58, and 23 Vict. ch. 24—Inter-provincial Law.*

The defendant, who was resident and domiciled in the Province of Ontario, was served there with the writ of summons by which an action for the price of goods sold and delivered was commenced against him in the Superior Court of the Province of Quebec. The cause of action arose partly at least in Ontario. He did not appear and judgment was entered against him by default. In an action upon that judgment brought in a Division Court in Ontario by the same plaintiff against the same defendant, the latter pleaded that the Quebec judgment was of no effect in Ontario, and that in truth he was not indebted to the plaintiff:—

*Held*, that the provisions now found in secs. 51 and 52 of the Judicature Act, R.S.O. 1927, ch. 88, which were enacted by an Act of the Province of Canada, 1860, 23 Vict. ch. 24, must be confined to actions upon judgments obtained in the Province of Quebec, which, according to the principles of international law (applicable as between the different Provinces of the Dominion), are entitled to extra-territorial recognition, i.e., to those cases in which the writ was served within the Province of Quebec upon a person domiciled and resident therein and who owed allegiance to the laws of Quebec. Section 58 of the Act of the Province of Canada, 1858, 22 Vict. ch. 5, was never in force in Ontario.

*Court v. Scott* (1881), 32 U.C.C.P. 148, overruled.

*Vézina v. Will H. Newsome Co.* (1907), 14 O.L.R. 658, approved.

The Quebec judgment was, therefore, of no effect in Ontario, and the action upon it should be dismissed, unless the plaintiff chose to amend and sue upon the original cause of action.

*Per RIDDELL, J.A.*, dissenting:—Section 51 of the Judicature Act, providing that where an action is brought on a judgment obtained in Quebec in an action in which the service on the defendant was

personal, no defence which might have been set up by the original action may be made in the action on the judgment, should not be read as meaning that the service of the original process must have been in Quebec.

The *Vézina* case has no application.

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AN appeal by the defendant from the judgment of the Third Division Court of the District of Temiskaming in favour of the plaintiff for the recovery of \$160.03 in an action upon a judgment recovered in the Superior Court of the Province of Quebec.

October 15. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, J.J.A.

*Hamilton Cassels*, for the appellant, argued that a Quebec judgment obtained, as here, by default after service in Ontario on a person domiciled in Ontario, is not conclusive as to the defendant's liability: *Vézina v. Will H. Newsome Co.* (1907), 14 O.L.R. 658. He relied entirely on this case.

*H. H. Davis*, K.C., for the plaintiff, respondent, contended that the *Vézina* case was inconsistent with the earlier decision in *Court v. Scott* (1881), 32 U.C.C.P. 148. He submitted that the reasoning in the earlier case was right, and the *Vézina* case was not binding on the Court. When there is a judgment before the Court, as here, the defendant must prove that it is bad. It is *prima facie* good: *Swaizie v. Swaizie* (1899), 31 O.R. 324, at p. 332. "Personal service" in sec. 51 of the Judicature Act, R.S.O. 1927, ch. 88, does not mean personal service in Quebec.

November 16. MIDDLETON, J.A.:—Appeal from the judgment of his Honour Judge Hayward pronounced on the 19th January, 1928, in favour of the plaintiff in an action in the Third Division Court of the District of Temiskaming.

The action was based upon a judgment of the Superior Court of the Province of Quebec, in the District of Montreal, wherein the plaintiff in this action sued the defendant in this action for \$120.48 as the price of goods sold and delivered, and recovered judgment for this sum and for \$39.55 costs in the Quebec Court.

The writ in the Quebec action was served upon the defendant at Englehart, Ontario, where the defendant was domiciled and resident, not only at the time of the service of the writ but at the time of the transactions giving rise to the action. The defendant did not appear in the action in Quebec and judgment was rendered against him by default. In this action the defendant takes the position that the Quebec judgment is of no effect



App. Div. in this Province, and that in truth he is not indebted to the  
1928. plaintiff in any sum whatever, and he produces evidence in sup-  
port of his contention.

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The learned Judge has taken the view that the case of *Vézina v. Will H. Newsome Co.*, 14 O.L.R. 658, does not sustain the argument presented by the defendant's counsel.

The question presented is of considerable importance and merits careful consideration. To appreciate the situation it is necessary to recall in a very brief way the statutes which give rise to the problem.

These are, first, the Act of 22 Vict. ch. 5, sec. 58, passed in 1858, and which, for convenience, I shall mention as the Act of 1858. This Act was passed by the Legislature of the Province of Canada, and is intituled "An Act further to amend the Judicature Acts of Lower Canada," and it recites by preamble that it is desirable to amend the laws in force in Lower Canada relative to the administration of justice. The entire Act is a comprehensive enactment dealing with the administration of justice in Lower Canada. By sec. 58 provision is made for the service in Upper Canada of writs issuing in Lower Canada. This is permitted where the cause of action arose in Lower Canada. Had the statute been one enacted by the Province of Quebec after 1867, it would have been described as a provision for the service of process out of the jurisdiction, and, while binding upon the Courts of Quebec, it would not have had any extra-territorial effect. But because the statute was passed by the Parliament of the Province of Canada, having jurisdiction over both Upper and Lower Canada, it was thought to have legislative effect in both Upper and Lower Canada.

Two years later there was passed the Act of 23 Vict. ch. 24, which I shall hereafter refer to as the Act of 1860. This is an Act respecting foreign judgments and decrees. It recites that it is expedient to amend the laws of Upper and Lower Canada respecting foreign judgments and decrees and to assimilate the same. There are four enacting sections. By the first, it is provided that, in any suit brought upon a foreign judgment or decree "in either section of the Province," any defence may be set up that might have been set up in the original suit. The second provision is that in any suit in either section of the Province on a judgment obtained in the other section, where the service of process on the defendant has been personal, no defence that might have been set up in the original action can be pleaded in the action brought upon the judgment. The third enacting clause de-



finer what is meant by personal service in actions against corporations. The fourth clause is the converse of the second, and provides that in any action brought in either section of the Province upon a judgment obtained in the other section, in which personal service was not made and in which no defence was made, any defence that might have been set up to the original suit may be set up in the suit upon the judgment.

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The second and fourth of these four clauses are now surviving in modified form in secs. 51 and 52 of the present Judicature Act. The first provision was expressly repealed by 39 Vict. ch. 7, sec. 1 (Ont.)

The effect of this legislation was considered in 1881 by the Court of Common Pleas in *Court v. Scott*, 32 U.C.C.P. 148; it was there assumed that the Act of 1858 was still in force, and it was held that for that reason the Quebec judgment which was there sued upon in Ontario was conclusive in Ontario. The Act of 1860 was not a factor in the decision of the Court, but the Judges thought it wise to express their opinion with regard to it (pp. 154, 155): "It is not necessary, therefore, to consider R.S.O. ch. 50, sec. 145" (the place where this enactment was then found) "but I think it better to say what I think concerning it:" *per* Adam Wilson, C.J. The learned Chief Justice then quotes the section, and adds: "That section *primâ facie* means a *personal service* made in Quebec." He then points out that the object of the legislation of 1858 was to give to the Province of Quebec the right to serve out of the jurisdiction, a right which Ontario had under its legislation, "but that did not make the judgment in terms recovered upon such service unimpeachable, as that result follows from the general law." From this the learned Judge reaches the conclusion: "I am disposed to think the *personal* service referred to in sec. 145 will by reason of the then existing legislation referable to Quebec services in Ontario, under the Quebec Judicature Act before mentioned, apply to a personal service made of Quebec process in Ontario."

Mr. Justice Osler agrees that the Act of 1858 made the judgment binding in Ontario, and that it is "impossible to limit its meaning to personal service effected in the Province of Quebec, as he should probably have felt obliged to do but for the Act of 1858, authorising such service to be made here."

The law remained in this unsatisfactory position until the decision of a Divisional Court in 1907 in the case of *Vézina v. Will H. Newsome Co.*, already referred to. There the whole situation was very carefully canvassed by Sir William Meredith. He

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points out that the Act of 1858 had always been assumed by the Legislature to have been an Act relating to the Province of Quebec and the administration of justice there, and that it had never been continued in any of the Ontario statutory revisions, and that in the Province of Quebec the Act had been similarly treated as an Act relating to that Province alone, and that it had been from time to time varied and modified and now formed part of the Code of Procedure in that Province, and there appeared, in very much modified form, as a general provision authorising service of Quebec process outside of the jurisdiction of that Province, in a precisely analogous way to that in which the Ontario statutes authorise service of Ontario process in certain cases outside of the jurisdiction of Ontario.

He also points out that the question of the international recognition to be accorded to the judgments of foreign tribunals has now been crystallised and settled by the Privy Council in the Indian appeal of *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A.C. 670. While every Court is, for the purpose of pronouncing judgment, governed by the local legislation to which it is subject, and is bound to pronounce judgment accordingly, no territorial legislation can give jurisdiction which any foreign Court ought to recognise as against those who owe no allegiance or obedience to the power which so legislates. In a personal action against such a one, a decree pronounced *in absentem* by the foreign court, to which the defendant has not in any way submitted himself, is by international law an absolute nullity.

This principle, the learned Chief Justice says, and numerous cases bear him out, is applicable as between the different Provinces of the Dominion. The Courts of Quebec stand in precisely the same position when an action is brought in Ontario upon a judgment of these Courts as if they were foreign Courts.

*Court v. Scott (supra)* was founded altogether upon the assumption that the Act of 1858 was in force in Ontario. It was based, it now turns out, upon an entirely erroneous view of the legislation. The Act is not in force and the decision is no longer the law of this Province.

In the result the learned Chief Justice is of opinion (p. 664) that the "binding effect of the judgment sued on must, therefore, depend upon the rules of international law, and the appellant company not having been domiciled or resident in Quebec when served with the writ of summons, the judgment must be treated in the Courts of this Province as a nullity."

In other words, the provisions now found in secs. 51 and 52 of the Judicature Act must be read as confined to actions brought upon judgments obtained in the Province of Quebec, which, according to the principles of international law, are entitled to extra-territorial recognition, i.e., to those cases in which the writ was served within the Province of Quebec upon a person domiciled and resident therein and who owed allegiance to the laws of Quebec.

So read, these sections modify the rules of international law by permitting a defence to be made to an action brought upon a judgment obtained in Quebec against a person owing allegiance to the laws of that Province, in which the writ was not personally served upon him.

I realise that in so construing the statute a narrow view has been taken of the legislative intention, but I think it is impossible to believe that it was ever intended by the Legislature of this Province to surrender the jurisdiction of the Province over persons domiciled and resident here to the Courts of another Province.

I would also point out that, as is shewn by the compilation of the laws of Quebec made in the *Vézina* case, the original enactment of 1858 only gave to the Courts of the one portion of the old Province of Canada jurisdiction over the citizens of the other portion of that Province in cases in which the cause of action arose in that portion of the Province which was asserting jurisdiction, and that the provisions of the Quebec Code now in force permit service in many other cases. In the particular case now in hand the "cause of action" did not arise in the Province of Quebec, if to that expression the same meaning is attributed as in many jurisdiction cases — "the whole cause of action" — "everything necessary to be proved to enable the plaintiff to succeed." The action is for the price of goods sold and delivered. Material parts of the transaction took place within Ontario.

Even if I had a serious doubt as to the correctness of the decision in 1907, I should still have thought that we ought not to enter into any criticism of that judgment. It has stood for over 20 years and has been generally accepted as the law of this Province. In this case it is shewn that the defendant refrained from appearing in the Court of the Province of Quebec on the faith of this decision. The matter is one concerning the daily business of these two Provinces, and no doubt the decision has been acted upon in inter-provincial business ever since the case was decided, and the rule *stare decisis* ought here to be applied, and that which has come to be regarded as law should not be

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1928. is deemed to be desirable. I may add that the Quebec Code has  
LUNG the provisions of the Act of 1860, in a modified form, adopting  
v. the construction above indicated. The judgment of the Court  
LEE. of another Province is conclusive "if the defendant was personally  
Middleton, served in such Province, or appeared in the original action:" Code  
J.A. of Civil Procedure, arts. 210-213.

The effect of the re-enactment of the section in question in the various revisions of the statute is not without weight. See *per* Duff, J., in *Orpen v. Roberts*, [1925] S.C.R. 364, at p. 374.

I would, therefore, allow the appeal, and, if the plaintiff desires now to sue upon the original cause of action, I would remit the proceedings to the Court below to permit the necessary amendment to be made upon proper terms. If the plaintiff does not so elect, the appeal should be allowed and the action should be dismissed, both with costs. If the plaintiff elects as suggested, the appeal will be allowed with costs and the judgment will be vacated and amendments will be permitted, all costs lost in the Court below to be to the defendant in any event.

LATCHFORD, C.J., and ORDE, J.A., agreed with MIDDLETON, J.A.

RIDDELL, J.A.:—This is an appeal from the judgment of his Honour the Judge of the Third Division Court of the District of Temiskaming, "on the ground that the learned Judge erred in holding that the judgment obtained by the plaintiff against the defendant in the Province of Quebec was conclusive and that the defendant could not take advantage of any defence which he might have set up to the action in the Quebec Court."

The defendant, being domiciled in Ontario, was sued in the Superior Court of Quebec, being advised by his solicitor that he need not appear in the Quebec Court, as, if and when he should be sued in Ontario, he could then raise his defence in the Ontario Court; admittedly, he was personally served with process of the Quebec Court.

Proceedings were taken in the Third Division Court of Temiskaming on this judgment. The defendant on being served disputed the claim "on the ground that payment has been made in full to the Joyce Jung Company for all goods received by Wing Lee."

Notice of motion for speedy judgment was served, and the matter came on for hearing before his Honour, who refused to allow the defendant to go into the defence he had set up, viz.,



payment in full, upon the ground that this defence might have been set up in the Quebec Court. The defendant now appeals.

The greater part of the argument was based upon the case of *Vézina v. Will H. Newsome Co.*, 14 O.L.R. 658, and the statement of the annotator, Holmsted's Judicature Act, p. 212, that "judgments of the Courts of Quebec . . . are not conclusive evidence of liability unless there has been personal service of process in Quebec."

We may at once leave out of consideration the judgment in the case mentioned, it being upon another Act altogether.

In the sixth decade of the last century, there was considerable agitation looking toward greater co-ordination and mutual assistance in the Courts of the two discrete parts of the Province of Canada: this resulted in more than one statute. One of these was the Act (1858) 22 Vict. ch. 5; this Act, not being expressly continued or re-enacted, was considered by the Divisional Court in the *Vézina* case to be no longer in force. Another was the Act (1860) 23 Vict. ch. 24. The provisions of this statute, so far as we are at present concerned, were substantially re-enacted upon the first revision in Ontario, and appeared as R.S.O. 1877, ch. 50, sec. 145. This provision was continued in all the revisions, and now appears as R.S.O. 1927, ch. 88, sec. 51: "Where an action is brought on a judgment obtained in the Province of Quebec in an action in which the service on the defendant or party sued was personal, no defence which might have been set up to the original action may be made to the action on the judgment." There can be no pretence that such legislation is not perfectly valid, and we must give full effect to it. I can find nothing to indicate that when the Legislature says "the service on the defendant . . . was personal" we should introduce a gloss of our own and add the words "in the Province of Quebec."

That a plea of payment is one which could be set up in the Quebec Court is not disputed; and we have to deal only with the plea which was advanced. I think that the plea of payment was properly rejected; and this appeal should be dismissed with costs. At the same time, if the defendant desires to apply to the Quebec Court to set aside the judgment, as he omitted to defend under a misapprehension as to the law, I should be inclined to withhold this affirmance for a reasonable time to enable him to do so; he would, in any case, pay the costs of this appeal.

MASTEN, J.A., being absent on account of illness, took no part in the judgment.

*Appeal allowed (RIDDELL, J.A., dissenting).*

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## [APPELLATE DIVISION.]

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TAYLOR V. PEOPLE'S LOAN AND SAVINGS CORPORATION.

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*Fire—Occurrence of, in Building Occupied by Several Tenants—Invitee of one Tenant Injured in Attempting to Escape—Whether Owner of Building Liable in Damages to mere Licensee—Common Law Liability—Factory Shop and Office Building Act—"Factory"—Protection of Workers in—Municipal Act, R.S.O. 1927, ch. 233, secs. 259, 397(32), 508, 512, 513—By-law of Municipality—Failure to Conform to Statute—Delegation of Powers—Absence of Fire-escapes—Right of Action—Legislative Intent.*

The judgment of RANEY, J., 62 O.L.R. 564, reversed.

*Held*, that the plaintiff was not an invitee, but a mere licensee, of the defendants, though an invitee of the defendants' tenant—he did not come upon the defendants' premises for any purpose in which he and the defendants had a common interest, and there was no contractual relation between them.

Again, that which the owner of a building is called upon to guard is some physical condition of the building itself which has directly caused the injury to the plaintiff; there is no common law liability for the neglect to provide fire-escapes, a neglect which only contributed in an indirect way to a disaster resulting from a distinct cause—the fire from which the plaintiff was endeavouring to escape when injured; and there was no act of commission on the part of the defendants which caused damage to the plaintiff.

Therefore, the plaintiff's case did not come within the common law principle indicated in *Indermaur v. Dames* (1867), L.R. 2 C.P. 311.

2. There was no liability by reason of the provisions of the Factory Shop and Office Building Act, R.S.O. 1927, ch. 275, for, having regard to the definition of "factory" found in the Act, the entire building could not be regarded as a factory; and the Act was passed for the protection of workers in the factory, and had no application to the plaintiff, who was a mere licensee entering the premises for his own purposes.

3. The attempt to find liability by reason of the municipal by-law also failed, because:—

(a) No breach of the by-law had been proved—the owner of a building is called upon to erect fire-escapes only upon receiving a written notice requiring him to do so, and no such notice was proved.

(b) The by-law was bad upon its face, not being in conformity with sec. 397(32) of the Municipal Act, R.S.O. 1927, ch. 233; and the delegation to a municipal officer of the power to require the erection of fire-escapes in such cases as he deems proper being unauthorised.

(c) Considering the provisions of secs. 259, 397 (32), 508, 512, and 513 of the Municipal Act, there was no legislative intent to give a right of action to an individual aggrieved by the failure to observe the requirements of the by-law.

*Tompkins v. Brockville Rink Co.* (1899), 31 O.R. 124, referred to.

AN appeal by the defendants from the judgment of RANEY, J., 62 O.L.R. 564.

October 3. The appeal was heard by LATCHFORD, C.J., MIDLETON, MASTEN, and ORDE, JJ.A.

*I. F. Hellmuth*, K.C., and *T. N. Phelan*, K.C., for the appellants, contended that no duty to take care was owing by them to the plaintiff; there was no contractual relationship between them. The plaintiff was not an invitee of the appellants, but a bare licensee: *Cavalier v. Pope*, [1906] A.C. 428; *Robbins v. Jones* (1863), 15 C.B.N.S. 221; *Coleshill v. Manchester Corporation*, [1928] 1 K.B. 776; *Lane v. Cox*, [1897] 1 Q.B. 415; *Azole v. W. H. Yates Construction Co. Ltd.* (1927), 61 O.L.R. 416; *Walsh v. International Bridge and Terminal Co.* (1918), 44 O.L.R. 117. Only in case of a concealed trap is a person responsible to a bare licensee, and here there was no such trap: *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74; *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253. The Factory Shop and Office Building Act does not apply, because in the first place the building does not come under the definition of "factory" in the Act; and, secondly, the Act is only for the protection of employees, and the plaintiff was not an employee but only an invitee of a tenant of part of the building. No breach of a municipal by-law has been proved. The defendants never got any notice to put up fire-escapes. And, at any rate, non-compliance with the by-law would not give a right of action: *Phillips v. Britannia Hygienic Laundry Co. Ltd.*, [1923] 2 K.B. 832. Where a statute provides a penalty for its breach, no one person would have a right of action for individual injury: *Craies on Statute Law*, 3rd ed., p. 214; *Orpen v. Roberts*, [1925] S.C.R. 364; *Hagle v. Laplante* (1910), 20 O.L.R. 339.

*J. W. G. Winnett*, K.C., for the plaintiff, respondent, argued that the appellants were liable at common law, because they were negligent in not protecting the respondent, who was rightfully upon the premises as an invitee of the appellants, and not a mere licensee. The respondent was a member of the lodge which was a tenant of the appellant, and, as such member, was also tenant and so an invitee: *Mersey Docks and Harbour Board v. Procter*, *supra*; *Sutcliffe v. Clients Investment Co. Ltd.*, [1924] 2 K.B. 746; *Wise v. Perpetual Trustee Co. Ltd.*, [1903] A.C. 139. Even if the respondent was only a bare licensee (which was denied), the building not being provided with fire-escapes, was a trap. If the respondent was a licensee at all, he was a licensee with a common interest: *Holmes v. North Eastern Railway Co.* (1869), L.R. 4 Ex. 254. The Factory Act applies, because it protects people visiting the factory or office building. As to breach of the municipal by-law, the evidence shewed that the appellants had notice that they had not complied with the by-law.

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November 16. LITCHFORD, C.J.:—This appeal is from the judgment of Mr. Justice Raney, dated the 5th June, 1928, awarding the plaintiff \$15,000 damages. The action was against the defendant as owner of an old building in London, on the fourth storey of which was a room leased by a lodge or court of the Canadian Order of Foresters. The plaintiff was a member of the lodge.

A fire broke out in the second storey of the building while the plaintiff was in the premises so rented. He sought to escape, first by the stairway, but found there dense volumes of smoke ascending, and then went to more than one window expecting to find a fire-escape. The building was not equipped with such appliances, and the plaintiff was forced to jump from a window into a net held by firemen on the street below. He had in the meantime sustained grievous injuries by burning. The quantum of damages awarded, while the subject of attack in the notice of appeal, was not questioned on the argument at bar.

At the trial, in answer to a question by the trial Judge, Mr. Winnett, as counsel for the plaintiff, stated that the grounds of the action were: "lack of fire-escapes; improper construction of the building; no appliances to prevent fire; it was a trap or concealed danger that the plaintiff was not aware of;" breach of a municipal by-law requiring fire-escapes on such a building as the defendants'; and breach of the Factory Shop and Office Building Act, R.S.O. 1927, ch. 275.

So far as the action is based on breaches of the by-laws or the Factory Act, I am, with great respect, of the opinion that it is not maintainable.

A breach of a section of a by-law would have subjected the owners of such a building, the defendants, to a penalty on prosecution. Such breach would take place if, and only if, within one month after receiving written notice to erect fire-escapes, he failed to provide them according to a design approved by the city's building inspector. A fireman inspected the building in February, 1926, and, finding that it was not equipped with fire-escapes, left in the office of the defendant corporation a card on which he had written "No fire-escapes"—a mere statement of fact and not the notice prescribed by the by-law. Had a prosecution for infraction of the by-law been instituted, it would have failed to result in a proper conviction. There was certainly no breach of the by-law. Even if a breach gave the plaintiff a cause of action—as to which it is unnecessary to



express an opinion—he cannot found his case on a breach of a by-law that the defendant corporation did not break.

The same reasoning applies with greater force to the requirements of another section of the by-law referred to by the learned trial Judge, requiring a building considered unsafe to be put in a safe condition after notice. No such notice was ever given.

The fact that still another section of the by-law requires the street-door of such a building to open outwards is quite irrelevant. The plaintiff's injuries were not in any respect a consequence of the way in which the street-door swung.

Section 59 of the Factory Shop and Office Building Act, R.S.O. 1914, ch. 229, in force at the time the plaintiff sustained injury, is regarded by the learned trial Judge as enuring to the benefit of any one who is in a factory or office building as an invitee of the owners.

With submission, I would say in the first place that the plaintiff was not an invitee of the owners. Any invitation extended to Taylor was not from the defendants but from the defendants' tenant of the lodge-room. For no business and for no material interest of the defendants was the plaintiff on the premises owned by the defendants. (See definition of "invitee" by Lord Buckmaster in *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74, 80). Taylor was a mere licensee of the defendants.

Then the Act mentioned is strictly limited in its ambit. It is headed, "An Act for the Protection of Persons Employed in Factories Shops and Office Buildings." Its provisions seem to me to be restricted to imposing duties on employer and owners to persons *employed* by them—and to none other—in factories, shops, and office buildings. If I am right in my opinion as to the limited scope of the Act, no cause of action can be based on the Act by the plaintiff—who was not an employee of the owners of the building or of any person conducting a factory or shop on the premises.

The only ground, I think, upon which Taylor could be held entitled to recover damages is the breach by the defendants of some duty which, apart from the statute, was owing to the plaintiff in the circumstances. In other words, Taylor had no right of action against the defendants except at common law.

Before expressing my opinion on this phase of the case, it seems important to point out that there was no contractual relation whatever between the plaintiff and the defendants.

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Hence such cases as *Hagle v. Laplante*, 20 O.L.R. 339, and *Macleanan v. Segar*, [1917] 2 K.B. 325, have no application here.

It is further to be remembered that there was no act of *commission* on the part of the defendants which caused damage to the plaintiff. It is on the omission to provide fire-escapes that the judgment in the plaintiff's favour is founded. The distinction is material. See judgment of Bramwell, B., in *Southcote v. Stanley* (1856), 1 H. & N. 247, 250, where no act of commission was alleged. The owner would be clearly liable if he created a new source of danger and gave no warning of it: *Corby v. Hill* (1858), 4 C.B.N.S. 556. Nothing, however, was done at any time by the defendants to change the condition of the building or place in it anything in the nature of a concealed danger or trap.

In *Latham v. R. Johnson & Nephew Ltd.*, [1913] 1 K.B. 398, Lord Justice Farwell says (p. 404):—

"Now the law as to mere licensees is well settled. The grant of the licence to go on the land creates no right, but merely affords an answer to a charge of trespass: *Bolch v. Smith* (1862), 7 H. & N. 736, 745. It is a mere permission, and those who take it must take it with all chance of meeting with accidents."

This statement, as the learned Lord Justice points out later (p. 405), is subject to certain exceptions such as "Allurement" in the evil sense of alluring with malicious intent to injure, and "Concealed trap," or something added to the condition of the ground as it was when the licence was given in a way likely to be dangerous and without giving notice to the licensee. He then refers to the statement of Willes, J., in *Corby v. Hill*, 4 C.B.N.S. at p. 567: "A person coming on lands by licence has a right to suppose that the person who gives the licence . . . will not do anything which will cause him injury."

In the *Fairman* case, [1923] A.C. 74, the plaintiff was a mere licensee. She lodged with her sister, who was a tenant of the defendants, and was injured owing to the fact that a stairway leading to the tenant's premises had become dangerous through use. Lord Wrenbury says (p. 95):—

"It is well to define at the outset what, in my judgment, is the relation between the plaintiff and the landlord in respect of which she can sue. There was no contractual relation. She was a person who, as between herself and the landlord, was entitled to use the landlord's staircase, because she was there rightly for the purpose of gaining access to premises which he had demised to a tenant with an implied right of use by the

tenant and all persons lawfully resorting to the tenant's premises. She was, I think, the invitee of the tenant, and, in consequence, the licensee of the landlord.

"The position as between the owner of premises and a licensee is that permission is given to come upon the premises such as they are. The owner of dilapidated premises may demise them such as they are: *Cavalier v. Pope*, [1906] A.C. 428. A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term, for, fraud apart, there is no law against letting a tumbledown house."

A more closely analogous case to this would be difficult to find. It is conclusive against the right of the plaintiff to recover damages in the circumstances of this case.

The appeal must therefore be allowed with costs and the action dismissed with costs.

MIDDLETON, J.A.:—The learned Judge whose judgment is in review placed his decision in favour of the plaintiff upon three distinct grounds: first, the common law principle indicated in *Indermaur v. Dames* (1867), L.R. 2 C.P. 311; secondly, upon a breach of a by-law of the City of London; and thirdly, upon a violation of the Factory Act. After careful consideration, I am unable to agree with the result arrived at and shall content myself with stating the reasons for my conclusion very shortly.

As to the first ground of decision, I think the plaintiff fails for two distinct reasons. He has not shewn himself to be an invitee of the defendants. He was a mere licensee of the landlords, although he was an invitee of the tenant. He did not come upon the premises for any purpose in which he and the defendants had a common interest.

I further think the case does not fall within the principle relied upon, because that which the owner of a building is called upon to guard is some physical condition of the building itself which, in the events which have happened, has directly caused the injury to the plaintiff, e.g., a broken tread in a stair which caused the plaintiff to fall. The obligation has never been extended to the absence of fire-escapes, or similar conditions which do not themselves injure but only contribute in an indirect way to a disaster resulting from a quite distinct cause, in this case the fire from which the plaintiff was attempting to escape. There is no case indicating any common law liability to erect a fire-

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escape. This duty has been frequently imposed by statutory provisions.

The attempt to uphold liability by reason of the provisions of the Factory Act also fails for two distinct reasons. Having regard to the definition of "factory" found in the Act, the entire building here cannot be regarded as a factory. The "factory" is confined to the particular room in which the manufacturing process is carried on. In the second place, the Factory Act was passed for the protection of workers in the factory; and, while it confers upon them a right of action where there has been a breach of its provisions resulting in injury, it has no application to one who, like the plaintiff, had nothing to do with the factory but who was a mere licensee entering the premises for his own purposes.

Lastly, the attempt to find liability by reason of the municipal by-law also fails, I think, for several reasons. In the first place, no breach of the by-law has been proved. The landowner is only called upon to erect a fire-escape upon receiving a written notice requiring him so to do, and no such notice is proved.

In the second place, the by-law is upon its face bad, first, because it is not in conformity with the provisions of the Municipal Act which authorise the passing of a general by-law compelling the owners and occupants of buildings more than two storeys in height, except private dwellings, to provide proper fire-escapes therefor, at such places and of such patterns and mode of construction as may be deemed proper, and for prohibiting the occupation of any such building unless and until such fire-escapes are provided. This does not justify the passing of the vague, uncertain, and cumbersome by-law here adopted. And, secondly, because the delegation of the power to the municipal officer to require the erection of fire-escapes in such cases as he deems proper is altogether unauthorised.

But on a far wider principle I think the entire argument is misconceived. Where a supreme legislative authority by its enactment imposes a duty upon any individual to do something for the benefit and protection of a particular class, an action will lie at the instance of any member of the class for an injury which has resulted from the neglect of that duty. Where a particular penalty is by the statute provided to secure the observance of the statute and as a punishment for the breach of its requirements, this may or may not indicate an intention on the part of the Legislature that this liability for a penalty is to be the sole result of a breach of the requirements of the Act. In each case the task



confronting the Court is to discover the intention of the Legislature. It is true that it has been held that regulations made under the authority of a statute may be treated as being part of the statute for the purpose of this inquiry: *Ross v. Rugge-Price* (1876), 1 Ex. D. 269; but I know of no authority indicating that the same principle is applicable to municipal by-laws passed under the general authority of the Municipal Act, or under any specific provision of that Act.

When the Municipal Act itself is looked at, the absence of any such intention on the part of the Legislature becomes clearly apparent. The Act itself is passed under that provision of the British North America Act giving the Province power to deal with municipal institutions, and does not purport to be and is not an exercise of the general provincial power to deal with property and civil rights. However, extensive powers are granted to the municipal body. These, generally speaking, fall within the words of sec. 259 of the Municipal Act, R.S.O. 1927, ch. 233—the council may pass by-laws and make regulations “for the health, safety, morality, and welfare of the inhabitants of the municipality”—and I think that these words aptly describe the municipal legislative function, not only when exercising the general legislative powers conferred by this section, but also when exercising any of the enumerated powers specifically given. This becomes still more apparent when reference is made to sec. 508, which provides for the enforcement of by-laws. This is to be accomplished by a penalty not exceeding \$50 to be recovered under the provisions of the Summary Convictions Act, the penalty going to the municipality save in cases where the prosecution is at the instance of a private prosecutor, in which case one-half the penalty goes to him. Manifestly this penal provision would be inadequate as a sanction in many cases. This is remedied by the special provisions found in secs. 512 and 513 and scattered elsewhere throughout the Act. These are most significant. By sec. 512, where the council has authority to pass a by-law which requires a thing to be done, the by-law may direct that in default the corporation may itself do the thing required and recover the expense. By sec. 513 it is provided that where any building is erected or used in contravention of a by-law the municipality may maintain an action for an injunction. All this is cogent evidence of the absence of any legislative intent to give a right of action to an individual aggrieved.

When sec. 397 (32), the clause authorising the passing of by-laws requiring the erection of fire-escapes, is itself referred to,

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it is found to contain the appropriate sanction, for it gives the municipality power to provide by the by-law the right to prohibit "the occupation of any such buildings unless or until such fire-escapes are provided."

The case of *Tompkins v. Brockville Rink Co.* (1899), 31 O.R. 124, and the cases which have followed in its train, go a long way to support this opinion.

ORDE, J.A., agreed with MIDDLETON, J.A.

MASTEN, J.A., being absent through illness, took no part in the judgment.

*Appeal allowed.*

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[APPELLATE DIVISION.]

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ESTEN v. ROSEN.

Nov. 16.

*Contribution—Indemnity—Judgment against two Defendants Jointly and Severally for Damages in Tort—Degrees of Fault not Indicated—Payment to Plaintiff by Company Indemnifying one Defendant—Assignment of Judgment to Bare Trustee for Company—Issue of Execution against the other Defendant—Fraud—Rule as to Contribution among Joint Tort-feasors—Extent of—Suggestion as to Legislation.*

In this action judgment was recovered by the plaintiff against the two defendants jointly and severally for the amount of the damages sustained by the plaintiff by reason of the negligence of both defendants in the operation of their respective motor-vehicles upon a highway. There was no contractual relation between the defendants, and there was no finding as to the degree of fault. An insurance company stood behind each defendant. The company which had indemnified the defendant R. against liability for the consequences of negligence paid the plaintiff the full amount for which he had recovered judgment, and obtained from the plaintiff an assignment of the judgment to a bare trustee for the paying company. A writ of *fi. fa.* was then issued upon the judgment and placed in the sheriff's hands for execution against the defendant W. The writ was set aside by order of the Judge of the Court from which it was issued:—*Held*, on appeal from the order, that it was the duty of the Court to scrutinise the actual transaction and ascertain the facts; and, upon the facts, the taking of the assignment to a trustee was a fraud, the assignment was void, and the writ was properly set aside. The insurance company would be subrogated to the right of R., but it acquired no right unless R. had himself a right to contribution. *Adams v. White Bus Line* (1921), 184 Cal. 710, and earlier American cases, followed.

But there is no right to contribution among tort-feasors.

The doctrine of *Merryweather v. Nixan* (1799), 8 T.R. 186, is applicable to all tort-feasors, and is not confined to cases in which there was one *injuria* as well as one *damnum*.

*Remarkd*, that if the doctrine should in the future be modified by legislation such legislation should not be framed so as to bring about an equality of contribution among wrongdoers without regard to the actual degree of fault.

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AN appeal by the defendant Rosen from an order of one of the Judges of the County Court of the County of York setting aside a writ of execution against the defendant Wedd.

October 5. The appeal was heard by LATCHFORD, C.J., MIDDLETON, MASTEN, and ORDE, JJ.A.

T. N. Phelan, K.C., for the appellant, argued that the principle of no contribution applied as to joint tort-feasors only, and the principle of *Merryweather v. Nixan* (1799), 8 T.R. 186, was limited to cases of a joint tort. It had no application to cases where separate and independent *injuria* had resulted in damage to the plaintiff: *Walker v. H. Stainton Ltd.* (1925), 28 O.W.N. 213; *The Koursk*, [1923] P. 206, [1924] P. 140; Clerk and Lindsell on Torts, 7th ed., p. 59. If that principle did apply, then the causes of action had passed into a judgment, and in any event the Court had no right to go behind that judgment to inquire whether or not it was founded on a joint tort. The plaintiff could assign the judgment to any one, and the assignee could enforce it. There was no principle of law to prevent any one of the defendants becoming an assignee of the plaintiff's rights.

J. C. M. German, for the defendant Wedd, respondent, contended that there could be no contribution between tort-feasors: *Merryweather v. Nixan*, *supra*. It was not competent for one joint defendant, on paying a judgment, to take an assignment of it to himself, or to a nominee, and to enforce it against his co-defendant: *Jenkins v. Jenkins* (1928), 44 Times L.R. 483; *Robe and Clothing Co. Ltd. v. City of Kitchener* (1923), 55 O.L.R. 1; *Adams v. White Bus Line* (1921), 184 Cal. 710.

November 16. MIDDLETON, J.A.:—An appeal from an order of his Honour Judge Widdifield setting aside an execution issued against the defendant Wedd.

The action was for damages sustained by the plaintiff by reason of the negligence of the defendants in the operation of their respective automobiles upon the highway. The result of the hearing was that each was found to have been negligent, and



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the injury sustained by the plaintiff was found to have resulted from this negligence, and so there was a recovery against the defendants jointly and severally for the amount of the damage sustained by the plaintiff.

Insurance companies stood behind the respective defendants, and the question now in issue really resolves itself into this—Can the company which insured Rosen against liability for consequences of his negligence, by the device about to be mentioned, secure contribution or indemnity from the defendant Wedd or the company which indemnified him?

Subject to an argument presented by Mr. Phelan, to be hereafter considered, it is admitted that there is no ground upon which Rosen can claim indemnity or contribution from Wedd or which would give Wedd any right against him. There is no contractual relationship between them, and until the accident they were strangers. There is nothing to indicate the respective degrees of negligence on the part of each which resulted in the accident and there is no statute which indicates that in the absence of any such finding they are to be presumed to be equally at fault (*cf.* the Contributory Negligence Act). It was enough for the plaintiff to shew that the negligence of each defendant was a contributory cause to the accident, no matter how slight the fault of either might be. Without knowing more, it might be regarded as unjust that the one defendant should pay all the damages awarded, but that might in truth be abstract justice; one defendant might be so much more to blame than the other that he should shoulder substantially the whole burden, and it might be great injustice in some cases to require an equal contribution. In the absence of a finding as to the degree of fault, it is idle to speculate as to justice or injustice.

In this case the fact is that neither defendant has paid anything. The insurance company, having in some way learned of the equitable maxim *vigilantibus non dormientibus jura subveniunt*, with diligence sought the plaintiff, and, paying him the full amount of the verdict and (it was suggested) a handsome bonus, procured his signature to a document by which, in consideration of \$1 and other good and valuable consideration him thereunto moving, he assigned his judgment to a solicitor's clerk, and on the faith of this a writ of *fi. fa.* has been issued and placed in the hands of the Sheriff for execution against Wedd. We are not told whether leave was obtained to issue this execution, as would appear to be necessary under the practice, but both counsel



join in asking that this motion be dealt with upon the assumption that that which was done was technically regular.

Although the assignment is to a solicitor's clerk, it is plain that the money came from the insurance company, and if one desires to avoid calling this clerk a "man of straw" or a "dummy" he may at least be described as a bare trustee for the insurance company.

If it be admitted that the judgment was the plaintiff's property and that he had the right to select the defendant from whom he would collect his verdict and that the individual so selected would have no right to complain, and if it be also admitted that the plaintiff could assign his judgment to an actual purchaser and that the purchaser could exercise the like option, yet it is open to the Court and it is the duty of the Court to scrutinise the actual transaction and ascertain what the facts really are. Here there was no sale and no purchase; there was nothing but payment. The money came from the insurance company, and it paid the money because the verdict had passed against Rosen, whom it was bound to indemnify. The taking of an assignment to this trustee was in fact a fraud. The facts are plain and admit of no doubt.

The situation is cogently stated by the Court of Appeals of New York in *Horbeck v. Vanderbilt* (1859), 6 Smith (20 N.Y.) 395, where Selden, J., says, in very similar circumstances: "The general principles upon which this case depends are simple and plain. Where one of several defendants against whom there is a joint judgment pays to the other party the entire sum due, the judgment becomes thereby extinguished, whatever may be the intention of the parties to the transaction. It is not in their power, by any arrangement between them, to keep the judgment on foot for the benefit of the party making the payment. If, therefore, in such a case, the latter takes an assignment to himself, or, unless under special circumstances, even to a third person for his own benefit, the assignment is void and the judgment satisfied."

From another angle the same thing was said by the Supreme Court of Pennsylvania in *Boyer v. Bolender* (1889), 129 Penn. St. 324, at p. 328, where the Chief Justice says: "To state the case briefly, it was an attempt on the part of one wrongdoer to enforce contribution from the others who participated in the wrong. This, under all the authorities, cannot be done;" and the fact that the defendant paying had had the judgment assigned to a third person, "a mere man of straw," made no difference.

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This was described as a fraud, and, as in the case in hand, it "did not need any astuteness in the court below to discover the fraud . . . the record was saturated with it."

The same result followed in the case of *Adams v. White Bus Line*, 184 Cal. 710, where there was a statute providing for the keeping alive of a judgment against more than one to enable rights to indemnity or contribution to be worked out. This, it was held, did not change the general law as to the absence of any right to contribution among tort-feasors, nor did the fact that payment was made by an indemnity company make any difference. The indemnity company would be subrogated to the right of the person insured, but it acquired no right unless the person assured had himself a right to indemnity or contribution.

In some States, and possibly here before the Mercantile Law Amendment Act, even in the case of a judgment against a principal and a surety, payment by one satisfied the judgment and no assignment could keep it alive: see, e.g., *Grizzle v. Fletcher* (1920), 105 S.E.Repr. 457, at p. 458, where it was said: "The payment of a judgment by any one of the judgment debtors extinguishes the judgment at law. . . . The creditor may . . . not sell the judgment to one of the judgment debtors so as to keep it alive at law."

In equity and under our statute any right to contribution which exists will be preserved: *London and Canadian Loan Co. v. Morphy* (1888), 14 A.R. 577; *Honsinger v. Love* (1888), 16 O.R. 170.

Mr. Phelan argued forcibly and at length that the principle of *Merryweather v. Nixan*, 8 T.R. 186, should be confined to cases in which there was one *injuria* as well as one *damnum*, and that it had no application to cases in which, although there was one *damnum*, the *injuria* was different in the case of each defendant.

The rule in its widest sense, as applicable to all tort-feasors, has become part of the settled law of England and of this Province, and it must prevail unless the Legislature sees fit to interfere or some modification of this now well established doctrine is made by the House of Lords or the Privy Council: *Sutton v. Town of Dundas* (1908), 17 O.L.R. 556. The discussion of the principle in *The Koursk*, [1924] P. 140, and a learned annotation of that case in 40 L.Q.R. 384, shew that there is much to be said in favour of modifying the rule, but it is to be hoped that any legislation will not be based upon any such principle as bringing about an equality of contribution among wrongdoers without regard to the actual degree of fault.

In the case in hand the conduct of the insurance company appears to be harsh in the extreme, as the assignment was made upon the distinct understanding with the plaintiff, as shewn by the solicitor's undertaking, that only contribution would be attempted to be enforced as against Wedd, yet an execution was issued and placed in the Sheriff's hands for the full amount of the judgment.

The appeal should be dismissed with costs.

LATCHORD, C.J., and ORDE, J.A., agreed with MIDDLETON, J.A.

MASTEN, J.A., being absent through illness, took no part in the judgment.

*Appeal dismissed.*

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[APPELLATE DIVISION.]

BENDER V. NATIONAL ACCEPTANCE CORPORATION LTD.

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Nov. 16.

*Sale of Goods — Conditional Sale Agreement — Ownership — "Sale" — Subsequent Sale by "Person Having Sold the Goods" — Possession — Sale of Goods Act, sec. 25.*

E., a dealer in automobiles, sold or went through the form of selling an automobile to C., under a conditional sale agreement, taking a promissory note for a part of the price. This note he took to the defendants, an automobile financing company, and discounted it, at the same time transferring the agreement to the defendants, who duly filed it in accordance with the Conditional Sales Act. The automobile was left in the possession of E., who dishonestly sold it to the plaintiff:—

*Held*, that, the real owner of the car being E. or C. or both, E. had authority to dispose of his security, the conditional sale agreement, to the defendants, and the defendants were thereafter the owners in law of the automobile; the effect of the transaction between E. and C., along with that between the defendants and E., was a "sale;" and, whether the defendants or C. should be considered the purchaser, E., the "person having sold (the) goods," continued in possession and was in possession when he sold the automobile to the plaintiff; and this was effective to transfer the property to the plaintiff under sec. 25 of the Sale of Goods Act, R.S.O. 1927, ch. 163.

An appeal by the defendants Hare & Chase of Toronto Ltd. from the judgment of WRIGHT, J., of the 30th May, 1928, at the trial, in favour of the plaintiff.

The action was for damages for seizure of the plaintiff's motor-car and for a declaration that the plaintiff was the owner of the

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car free from any charge of the defendants and entitled to possession. By the judgment the plaintiff was granted the declaration asked for, damages assessed at \$25, and the costs of the action.

October 15. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, J.J.A.

*A. G. Slaght*, K.C., for the appellants, argued that they knew of nothing wrong in the transaction, and advanced the money in good faith, and had registered forthwith the conditional sale agreement and the assignment thereof to them. This completed their title under the statute.

*L. R. Cumming*, for the respondent, contended that by virtue of the provisions of sec. 25 of the Sale of Goods Act, R.S.O. 1927, ch. 163, the sale from one Embree to the plaintiff was valid, and the defendants, not being in possession of the car, were not protected by their registration of the conditional sale agreement: *Re Potter* (1922), 22 O.W.N. 159.

November 16. RIDDELL, J.A.:—This case arose through the dishonesty of one Embree; he was a dealer in automobiles in Windsor, and he sold—or at all events went through the form of selling—an automobile to one Currie, under the usual conditional sale agreement, taking a note for some part of the price. This note he took to the defendants, an automobile financing company, and discounted it, at the same time transferring the agreement to the defendants. The car was left, at least most of the time, in the possession of Embree; and he took advantage of that fact to sell it to the plaintiff. The question in this action is as to who owns the car, it being also stated that the defendants filed the conditional sale agreement in accordance with the statute.

At the trial before Mr. Justice Wright, without a jury, the learned Judge found that the alleged sale to Currie was fictitious, and was intended to assist Embree in his financial affairs, by furnishing him with an apparently good note, which he might, as he did, discount with a financing firm. Then, my learned brother held that the sale to the plaintiff was valid by reason of the provisions of the Sale of Goods, Act, R.S.O. 1927, ch. 163, and gave judgment for the plaintiff for the car, \$25 damages, and costs. The defendants appeal.

In the view I take of the case, it is unnecessary to consider whether the alleged sale to Currie was a mere form or not; undoubtedly Embree and Currie made it appear as an honest



sale, made *bonâ fide*; but this is immaterial, the real owner being Embree or Currie or both. Embree had perfect authority to dispose to the defendants of the security he had taken, in the conditional sale agreement; and the defendants were thereafter the owners in law of the car. Whether this was a "sale" within the meaning of the Sale of Goods Act, R.S.O. 1927, ch. 163, we need not consider; the effect of the transaction between Embree and Currie, along with the transaction between the defendants and Embree, was a "sale." It is of no importance whether the defendants or Currie should be considered the purchaser; on the findings of fact, the "person having sold (the) goods" continued in possession, and was in possession of them when he, i.e., Embree, sold the car to the plaintiff. This was effective to transfer the property to the plaintiff under the Act, sec. 25.\*

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I can find nothing in the facts or the law that makes this section inapplicable; and I think we must give effect to the clear expression of the will of the Legislature. The appeal should be dismissed with costs.

LATCHFORD, C.J., and MIDDLETON and ORDE, J.J.A., agreed with RIDDELL, J.A.

MASTEN, J.A., being absent on account of illness, took no part in the judgment.

*Appeal dismissed.*

\* 25.—(1) Where a person having sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

(2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3) In this section the term "mercantile agent" shall mean a mercantile agent having, in the customary course of his business as such agent, authority either to sell goods or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

## [APPELLATE DIVISION.]

1928.

RE GRACEY.

July 20.  
Nov. 16.

*Will—Construction—Gift of Residue to Executors—Whether in Trust for Persons Entitled upon Intestacy—Trustee Act, sec. 53—Gift to Executors Beneficially—Contrary Intention not Appearing in Will—Position of Infant Executor—Right to Prove Will at Majority Reserved by Letters Probate—Right to Share in Residue—Land Held by Testator and Wife in Joint Tenancy—Whether Widow Had Right to Call upon Estate to Pay Mortgage thereon—Rights of Mortgagee—Devise of Homestead to Widow for Life—Whether Charges thereon Payable out of General Estate.*

The testator by his will gave certain legacies and devised certain land to his widow for life or widowhood—upon her death or marriage this land to go to the children of his sister. The residue of his estate he devised and bequeathed to “my executors.” In the next clause he appointed three of his nephews his executors. One of these was at the date of the will an infant of tender years, and was only 13 years old at the time of the testator’s death. Probate was granted to the adult executors, reserving to the infant a right to be admitted to executorship upon attaining majority:—*Held*, that the change made in the law by the Imperial Act of 1830, known as Sugden’s Act, adopted in this Province, and now found in sec. 53 of the Trustee Act, R.S.O. 1927, ch. 150, does not apply to cases in which the testator himself has given the property to his executors—the Act applies only to cases where there is a bare appointment of executors, so that the implication of law has to be resorted to in order to see whether the estate of the testator not otherwise disposed of vests in them beneficially *virtute officii*. *Williams v. Arkle* (1875), L.R. 7 H.L. 606, *In re Roby*, *Howlett v. Newington*, [1908] 1 Ch. 71, and *Attorney-General v. Jefferys*, [1908] A.C. 411, followed.

And in this case, as nothing in the will indicated a contrary intention, it was *held*, that the executors took beneficially.

*Held*, also, that, as the infant executor had not declined to prove the will, and his right to prove was reserved to him by the letters probate, his minority did not prevent his taking.

In the will the only provision for payment of debts was the usual one, that all the testator’s just debts should be paid by his executors. At the time of his death a parcel of land was held in joint tenancy by the testator and his wife, subject to a mortgage:—

*Held*, by KELLY, J., that the wife, on the death of the testator, became owner subject to the mortgage, and as between her and the testator’s estate she was not entitled to call upon the estate to pay the mortgage; but, if the mortgagee could recover from the testator’s estate upon a covenant by the testator for payment, devolution of the testator’s interest could not deprive the mortgagee of that right.

The testator devised his homestead to his wife during the term of her natural life or as long as she remained his widow:—

*Held*, by KELLY, J., that, there being no express provision for payment of taxes, upkeep of the house, or insurance, these charges were not to be paid out of the general estate.

MOTION by the executors of the will of Joseph Gracey, deceased, for the opinion of the Court upon three questions arising in the administration of the estate as to the meaning and effect of the will.

February 1. The motion was heard by KELLY, J., in the Weekly Court, Toronto.

*H. H. Shaver*, for the executors.

*J. M. Baird*, for the Official Guardian.

*F. C. Foster*, for the executors in their personal capacity.

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July 20. KELLY, J.:—The executors submitted three questions for the opinion of the Court.

(1) They ask if the debts of the estate include a mortgage on 259 Arlington-avenue, which at the time of the testator's death was held in joint tenancy by him and his wife, Jane Gracey, subject to such mortgage. There is not in the will any provision for payment of debts except that contained in the direction that all the testator's just debts, funeral and testamentary expenses, are to be paid by his executors. The Arlington-avenue property referred to being held in joint tenancy, the testator's wife on the death of the testator became owner subject to the mortgage (and other encumbrances if any) existing thereon at that time; and as between her and the testator's estate she is not entitled to call upon the estate to pay the mortgage. The rights of the mortgagee, however, must not be overlooked. There is nothing in the material to shew that the deceased became or was liable personally for payment of the mortgage, though on the argument it seems to have been assumed that he was liable. If the mortgagee's legal position is that he can recover from the testator's estate—as, for instance, upon a covenant by the testator for payment—devolution of the testator's interest in the property, which happened on his death, cannot deprive the mortgagee of such rights. As an illustration, if the mortgagee upon a sale of the property under the mortgage should not realise the full amount of the mortgage-debt, he would be entitled to claim against the testator's estate for the amount of the deficiency. In that event the circumstances might be such as to entitle the estate to claim over against the widow, who has taken the whole interest in the property subject to the mortgage. The facts upon which this latter possibility depend are not before me, and I therefore do not here decide upon it, but merely suggest a contingency which might arise.

(2) By para. 4 of the will the testator gave and bequeathed to his wife "my homestead, 259 Evelyn-avenue, Toronto, during the term of her natural life or as long as she remains my widow." The executors now ask, as there is no express provision for payment of taxes, upkeep of the house, or insurance, are they to pay these charges out of the general estate? The answer clearly must be "No."



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(3) The third question submitted is, "Does the bequest of all the residue of the testator's estate go to the executors, or was it the intention of the testator to leave it to the executors for some particular purpose?" The language of the residuary clause as it appears in the probate of the will is as follows: "*All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto my executors,*" then follows immediately this: "*And I nominate and appoint my nephews Joseph McLaughlin, John McLaughlin, and Lloyd McLaughlin, Courtright P.O., to be executors of this my last will and testament.*" I have examined the original will. In its preparation the draftsman made use of a partly printed form, the words above italicised being printed. The bequest is not to the executors by name but merely "to my executors." What follows, viz., the appointment of his executors, naming them and identifying them as his nephews, is independent of the bequest of the residue. In that bequest the executors are neither mentioned by name nor described as relatives of the testator; their names and their description as relatives are only in the clause by which they are appointed as executors. The testator, who had no children, left surviving his widow and several brothers and sisters; one of his sisters being the mother of the executors. Under the circumstances, no presumption arises in favour of the executors personally as against the testator's widow and his brothers and sisters.

My opinion is that the executors do not take the residue beneficially but as trustees for those entitled thereto as on an intestacy. *Re McCuaig* (1924), 25 O.W.N. 712, was decided under different circumstances.

Costs out of the estate; those of the executors as between solicitor and client.

The executors, in their personal capacity, appealed from the judgment of KELLY, J., upon the third question.

October 16. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, J.J.A.

*Shirley Denison*, K.C., for the appellants. This is not a case where the will does not dispose of the whole estate, and the executors claim the undisposed of residue *virtute officii*, and so the Trustee Act, R.S.O. 1927, ch. 150, sec. 53, does not apply. Here the residue is given to the executors in express terms and without qualification, and so no trust is imposed upon the gift: *Williams v. Arkle* (1875), L.R. 7 H.L. 606, at p. 614; *Theobald on Wills*, 8th ed., p. 548. The facts that the executors are nephews



of the testator, and that his wife is otherwise provided for, assist this construction.

*McGregor Young*, K.C., Official Guardian, for the infant executor, respondent. The infant executor is entitled along with the other two. Being an infant, he was unable to elect not to act as executor, and his right to act when 21 is reserved in the letters probate.

*H. H. Shaver*, K.C., for the widow and the executors in their representative capacity, submitted their rights to the Court.

November 16. MIDDLETON, J.A.:—An appeal by the executors in their personal capacity from an order of Mr. Justice Kelly, dated the 20th July, 1928, upon one question.

Joseph Gracey, the testator, died on the 12th August, 1927, leaving him surviving his widow and certain collateral relatives, his next of kin.

By his will, dated the 15th January, 1923, he gave certain legacies and devised certain land to his widow for life or widowhood, and upon her death or marriage this land to go to the children of his sister. The property specifically disposed of by the will did not exhaust the testator's estate. The residue he gives, devises, and bequeaths unto "my executors." In the clause immediately following he appoints three of his nephews his executors. One of these executors at the date of the will was an infant of tender years. At the time of the death he had attained the age of 13. Probate was granted to the adult executors, reserving to the infant a right to be admitted to executorship upon attaining majority.

By the order in review it is declared that the executors do not take the residue of the estate beneficially, but as trustees for those who would be entitled thereto upon an intestacy.

The question argued upon the appeal was: Is this finding right?

I think it desirable, in order to elucidate my view upon the point involved, to recall the law as it was prior to the passing in 1830 of the statute known as Sugden's Act, and the subsequent adoption of the same law in Ontario at a somewhat later date. This statutory provision is now found as sec. 53 of the Trustee Act, R.S.O. 1927, ch. 150.

By the preamble to the original statute, 11 Geo. IV & 1 Will. IV. ch. 40, the then existing law and the reason for the change are clearly set forth. It recites that:—

"Whereas testators by their wills frequently appoint executors, without making any express disposition of the residue of their

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personal estate: And whereas executors so appointed become by law entitled to the whole residue of such personal estate; and Courts of Equity have so far followed the law as to hold such executors to be entitled to retain such residue for their own use, unless it appears to have been their testator's intention to exclude them from the beneficial interest therein, in which case they are held to be trustees for the person or persons (if any) who would be entitled to such residue under the Statute of Distributions, if the testator had died intestate;" and that it is desirable to amend the law in this respect.

The amendment made is substantially that found in the Ontario statute to which I have referred, which provides that in such circumstances the executor, in respect of any residue not expressly disposed of, shall be deemed to be a trustee for the person, if any, who would be entitled to the estate under the Devolution of Estates Act in case of an intestacy, unless it appears by the will that the executor was intended to take the residue beneficially; but this enactment shall not prejudice any right in respect of any residue not expressly disposed of to which, if the Act had not been passed, the executor would have been entitled where there is not any person who would be entitled to the testator's estate under the Devolution of Estates Act upon an intestacy.

The executor's right which gave rise to this legislation was the right he obtained *virtute officii*, and as at that date an executor, by virtue of his office, was concerned merely with personal estate, it had no application to realty. Furthermore, the rule only dealt with property going to the executor by virtue of his office, and therefore it did not in any way interfere with or qualify any right or title that was given to the executor by the will itself.

With regard to all such gifts, Equity was exceedingly jealous and investigated the will with care to ascertain whether there was in truth intended a beneficial gift to the executor, or whether the gift was to him in trust. If once there was found anything to indicate that the executor was not intended to take beneficially but was intended to hold in a fiduciary capacity, in the absence of any object of the trust being indicated by the will, he was declared to hold the property in trust for the next of kin.

The same keen desire to create a trust brought about a series of cases in which it was held that the executor could not take beneficially anything that fell into the residue by reason of the failure of some particular provision of the will. By the abortive attempt to dispose of this, the testator had indicated that he did not mean the executor to have it.

The change made in the law by Sugden's Act did not in any way interfere with the cases in which the testator himself had given the property to his executor. This is made plain by the judgment of Lord Cairns in *Williams v. Arkle*, L.R. 7 H.L. 606, at pp. 615, 616:—

"This statute did not introduce any new rule for the construction of wills. It provides that an executor shall be a trustee for the next of kin unless it shall appear in the will that he is to take the residue beneficially. That is to say, he shall no longer take the residue by implication of law. If the residue is given by the will to the executor, the Court must decide the effect of the gift upon the construction of the will, and upon general principles applicable to that construction, just as before the statute it would have construed a similar gift of real estate. The statute therefore has, of necessity, no application where there is an express gift of residue. In my opinion, the statute was intended to apply only in those cases where the rule or presumption of law could be held to operate, and that, where an express devise of residue is found, the meaning of that residuary bequest must be ascertained by the ordinary rules of construction."

This principle was more recently applied in the case of *In re Roby, Howlett v. Newington*, [1908] 1 Ch. 71, a decision of the Court of Appeal, the point being shortly stated thus in the head-note:—

"The Executors Act, 1830, only applies in cases where there is a bare appointment of executors, so that the implication of law has to be resorted to in order to see whether the estate of the testator not otherwise disposed of vests in them beneficially *virtute officii*"

In *Attorney-General v. Jefferys*, [1908] A.C. 411, Lord Macnaghten (at p. 415) quotes from what is said by Lord Cottenham in *Mapp v. Elcock* (1849), 2 Ph. 793, at p. 796, as a very clear statement of the law:—

"It must be borne in mind that the title of an executor to personalty not otherwise disposed of did not arise from any gift of the testator, but from the operation of law incident to the office. The law vested the property in the executor, and if the testator had not directly or indirectly declared any purpose to which he was to apply it, there was nothing to interfere with the legal title of the executor, and he therefore retained such property for his own benefit; but this result being as was supposed generally unforeseen and not intended by the testator, Equity considered many circumstances as indicative of an intention contrary to the claim, and when they were found in the will, declared the executor trustee for the next of kin."

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I have therefore examined this will with the greatest of care to see if I can find anything in it indicating that the testator did not intend these executors to take beneficially. The case is plainly not under the statute, as the executors claim under a gift made by the testator. I can find nothing indicating in the least degree that they are not to take beneficially. They are nephews, and so near relatives of the deceased. Joseph, one of the executors, is given the testator's motor-car; John is given the testator's piano; and Lloyd, the infant, is not mentioned by name, save in the appointment as executor, and in the gift to the executors.

I can see nothing to indicate that the testator did not intend them to take beneficially. I think the learned Judge erred when he found against their contention, saying: "Under the circumstances, no presumption arises in favour of the executors personally;" and for that reason they could not take beneficially. In my view the executors take beneficially unless a contrary intention can be found in the will, and I find none.

For these reasons the appeal should be allowed.

At first I had much doubt as to the position of the infant executor. There is much to shew that where a legacy is given to an executor in that character, he cannot take the legacy unless he assumes the responsibility of the office. The legacy is supposed to be conditional, and not absolute, and it has been held that it will make no difference that the executor, by reason of age and infirmity morally and mentally, is incapacitated from proving the will: *Hanbury v. Spooner* (1843), 5 Beav. 630; *Re Hawkin's Trusts* (1864), 33 Beav. 570; but here the infant has not declined to prove the will, and his right to prove is reserved to him by the probate. I think this makes a difference, and that the mere minority of the infant should not prevent his taking.

Counsel for the next of kin and for the other executors did not seek to differentiate the case of the infant from the others.

There remains the question of costs. We cannot give costs of this appeal out of the estate, because this would be in effect making the successful appellants pay the costs of the unsuccessful respondent. The appeal will therefore be allowed without costs, unless the appellants consent to costs being paid out of the estate. In any event the costs of the guardian *ad litem* of the infant will be paid out of his share of the legacy.

LATCHFORD, C.J., and RIDDELL and ORDE, JJ.A., agreed with MIDDLETON, J.A.

MASTEN, J.A., being absent through illness, took no part in the judgment.

*Appeal allowed.*



## [APPELLATE DIVISION.]

PICKARD V. KERNICK.

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*Easement—Right of Way over Lane—Prescription—Limitations Act, R.S.O. 1927, ch. 106, sec. 34—Right Limited to Via Trita—Use for Motor-vehicles—Shade-trees Planted at Joint Expense on Sides of Lane.*

The right of the plaintiff to a way over a fenced driveway or lane, 49 feet in width, part of a parcel of land owned by the defendant, was *held*, to have been established by prescription by reason of user for more than 40 years: Limitations Act, R.S.O. 1927, ch. 106, sec. 34.

But *held* (LATCHFORD, C.J., dissenting), that the right was limited to the *via trita* or the part of the lane actually used by the plaintiff and his predecessors in passing over it with horses and vehicles.

The plaintiff's case rested upon prescription solely, and not upon any agreement, arrangement, or understanding made when the lane was laid out.

There was no restriction on the ordinary and reasonable use of the lane, and its use by motor-vehicles in 1927 was as ordinary and reasonable as its use by horse-drawn vehicles in earlier years.

It appeared that shade-trees planted on each side of the lane were paid for jointly by the parties or their predecessors; but the plaintiff had not proved a prescriptive right to compel the owner of adjoining land to maintain shade-trees for his benefit.

APPEAL by the defendant from the judgment of the County Court of the County of Huron in favour of the plaintiff in an action for a declaration of his right to an easement or right of way over land of the defendant. By the judgment of the County Court it was declared that the plaintiff was entitled to a right of way for all necessary purposes over a strip of land, "a fenced driveway" or lane, 49 feet in width, and it was directed that each party bear his own costs of the action.

June 13 and 14. The appeal was heard by LATCHFORD, C.J., MASTEN, J.A., ROSE, J., and ORDE, J.A.

W. R. Smyth, K.C., for the appellant, argued that the evidence did not shew that there had been any intention on the part of the original owners of the properties to set aside the 49 feet as a joint way; nor did the evidence shew that a right of way by prescription had been acquired by the plaintiff over the appellant's land. At most, the plaintiff was entitled to the use of the *via trita* in the centre of the lane. The period comprised in the lifetime of the widow of Richard Pickard should not be considered as part of the statutory 40 years. In any event, the plaintiff had no right to traverse the lane with automobiles, as

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such use had not been originally intended. Reference was made to Gale on Easements, 10th ed., p. 215 *et seq.*; *Clayton v. Corby* (1842), 2 Q.B. 813; *Pye v. Mumford* (1848), 11 Q.B. 666; *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48; *Watson v. Jackson* (1914), 31 O.L.R. 481.

*F. W. Gladman*, for the plaintiff, respondent, contended that a prescriptive right to the user of the whole lane had been established by the evidence. The intervention of the tenancy for life did not interfere with the running of the statute: Gale on Easements, 10th ed., p. 225. The evidence shewed that the plaintiff had the right to use the lane for horses; and, as automobiles had superseded these, the right to use automobiles followed.

November 16. LATCHFORD, C.J.:—This appeal purports to be from the “judgment, order, and decision, dated the 7th day of February, A.D. 1928, of his Honour E. N. Lewis, Judge of the County Court of the County of Huron” in an action concerning a right of way. The judgment entered is not of the date stated, but only certain findings of the learned trial Judge. Later, however, on the 29th March, 1928, the reasons for judgment, as they are called, were varied, and as so varied the judgment in appeal is that of the 29th day of March. The judgment is as follows:—

“This Court doth order and adjudge that the plaintiff is entitled to a right of way for all necessary purposes in, over, and upon the fenced driveway, being that part of lots 6 and 7 on the north side of John-street, Taylor’s survey, in the said village of Exeter, more particularly described as follows: commencing at a point in the northerly limit of John-street 8 feet and 3 inches easterly from the south-west angle of the said lot 6; thence easterly along the said northerly limit of John-street, 49 feet; thence northerly parallel to the westerly boundary of the said lot 7 to the northerly limit of the said lot 7; thence westerly along the northerly limits of lots 6 and 7, 49 feet; thence southerly parallel to the westerly boundary of the said lot 6 to the place of beginning.

“2. And this Court doth further order and adjudge that each party do pay his own costs of this action.”

The plaintiff is one of the sons, and the sole surviving executor, of one Richard Pickard, who, in 1881, purchased from one George Samwell, then his partner in business, lots 1 to 5 inclusive, and the westerly 12½ feet of lot 12 on the north side of

John-street in the village of Exeter, as shewn by what is called Taylor's survey.

Richard Pickard died in December, 1897. He devised his dwelling house and premises, with the land occupied therewith, together with other property, to his wife for life, after which what was so devised, with other property, was to pass to his executors.

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Litchford,  
C.J.

The plaintiff pleaded that, at the time his father made the purchase from Samwell, it was agreed between the partners that his father should have a right of way or lane in common with Samwell over parts of lots 6 and 7, Taylor's survey, from the front on John-street to the rear of the lots, of a width of 49 feet.

The deed to Pickard contains no reference to a right of way, and the plaintiff does not seek a reformation of the conveyance, but contends that, by reason of the length of time the lane has been used by himself, his mother and his father, a prescriptive right to its user has become established. He states that from 1881 until 1927, or for a period of about 46 years, he and his predecessors in title have had the open, continuous, and uninterrupted use of the lane. Not until 1927 was any attempt made by the defendant to interfere with such use. In the spring of that year, the defendant obstructed the access which the plaintiff and his mother and father had enjoyed from John-street through the lane to their barn on the south end of it. The obstruction then placed on the right of way materially interfered with the plaintiff's use of his barn or stable and other buildings in the rear of the Pickard property.

The defendant denied that the plaintiff had the right which he claimed, and pleaded that there was never any such user of the land as gave the plaintiff a prescriptive right thereto. He further alleged that he purchased from the surviving executor of Samwell without notice or knowledge of the claim which the plaintiff asserted, and that the acts complained of were in the ordinary use of his own property, over which the plaintiff had no legal right whatever.

The defendant's purchase was made in December, 1917. It included all of lot 6 except the 121½ links conveyed to Richard Pickard, and also lot 7.

The evidence discloses that for nearly nine years afterward, or until June, 1927, he did not interfere with the use made of the lane by the plaintiff's mother, the plaintiff himself, and his tenants.

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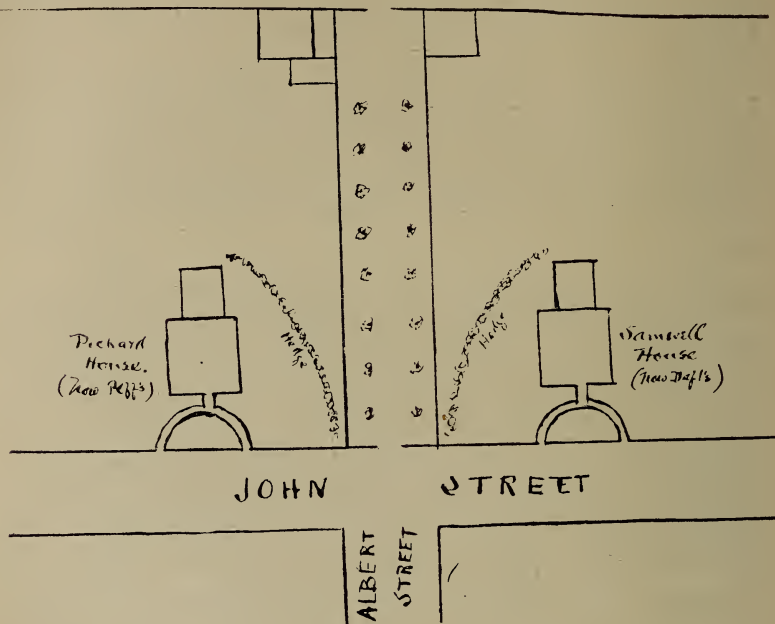
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A sketch was put in at the trial, and accepted by counsel for both parties, as properly shewing the premises of their respective clients, and the lane lying between which is the subject of the litigation.



The sketch, coupled with undisputed evidence, seems to me indicative of an intention on the part of Samwell to dedicate to the common use of himself and his partner the lane for its full width of 49 feet.

The Pickard house was erected in 1882, and bears precisely the same relation to John-street as that borne by the Samwell house, which had been built at an earlier date. Semi-circular paths, identical in size and form, led from the street to the front doors of both houses. Hedges were planted on both properties in similar locations on each. The barns could be reached from the street only by means of the lane. There is direct testimony as to what was intended by the parties in the evidence of the plaintiff:—

“Q. I notice the general lay-out of the Samwell property and the Pickard property with regard to walks and fences and so on seems to be about the same? A. Well, my father and Mr. Samwell were partners and at the time very close friends, and when it was mooted we should build a new house the intention was to



build it where we lived at that time, which was in Huron-street. In fact some bricks were drawn there to build the house. Mr. Samwell had made some suggestion to my father that he should come out and build near him; he thought it was a better part of the town, although at that time it was back in the country, and he made the suggestion, if he would do that, we would arrange this laneway meeting Albert-street so we could each have corner-lots and the benefit of this lane, and it was with that idea in mind that my father built there.

"Q. And, being friends and partners, they built similarly?  
A. Yes."

Albert-street, according to the sketch, abuts John-street on the south, and the lane, while shut off from John-street by a fence with a gateway in the centre, is of the same width as Albert-street, or 49 feet. The land at the time appears to have had but little value, as the consideration in Pickard's deed for five lots and part of the sixth is but \$600.

The plaintiff further stated, in regard to the establishment of the lane for the common use of his father and Gladman, that it was fenced on both sides and planted with trees.

"They (the fences) were erected after the house was built, the arrangement having been made to use the lane, and my father built the fence nearest him and Mr. Samwell built the fence nearest him or nearest his house.

"Q. Then the sketch shews trees on both sides of the laneway? A. Yes.

"Q. When were they planted? A. Directly after my father's house was built.

"Q. Can you tell us who planted them? A. Yes, Mr. John Allison, who had a nursery on the Thomas-road.

"Q. Who paid for them? A. They were paid for jointly."

The roadway or *via trita* in the centre of the lane was made by both the original parties, and after their death kept up by their widows. Even the defendant, before questioning the right of the plaintiff to the lane, himself improved the roadway with cinders or ashes in the same manner as had the Pickards and Samwells in previous years.

The defendant's purchase was made at a sale by auction. Mr. Stanbury, a solicitor in Exeter, read the conditions of sale and stated in the presence of the defendant that, while there was no encumbrance on the property, the lane was claimed as a right of way. The plaintiff also was present at the sale. He was asked at the trial:—

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C.J.

"Q. Can you give me his (Stanbury's) exact words? A. He said, we (meaning the Pickards) had a right of way, but he understood that we did not claim there was anything in the deed."

On cross-examination the defendant was asked:—

"Q. When Mr. Stanbury said Mr. Pickard claimed a right of way, did you say anything? A. No, I had not bought the place then.

"Q. Did you say anything at all that day about the right of way, either before or after you bought it? A. No, I do not mind of it."

The defendant had examined the property before the sale and knew of the existence of the lane over which a right of way was claimed. He reluctantly admitted having gone through the lane to and from the stable at the rear, in 1902 and 1903, when he purchased a horse from Richard Pickard.

In any case a registered title cannot prevail against a right founded on prescription: *Israel v. Leith* (1890), 20 O.R. 361; *Myers v. Johnston* (1922), 52 O.L.R. 658, 664.

The judgment must, in my opinion, be upheld.

Samwell, as owner of the fee, had unquestionably the right to set apart the lane over his lands for the use in common of himself and his partner. He acquiesced in such use, as did his widow, and also the defendant himself for nearly 9 years after his purchase. Till then, or for a period of more than the 40 years next before action, there was the open and continuous use of the lane by the owners of the dominant tenement and their tenants, and equally uninterrupted acquiescence in such case by the Gladmans and Kernick, the owners of the servient tenement. Further it appeared, as already stated, that Richard Pickard had joined with his partner in fencing the lane and planting it with trees, and that he, his widow, and the plaintiff had supplied materials to make and improve the roadway. For the effect of acquiescence, see *Gale on Easements*, 10th ed., p. 68 *et seq.*

The Limitations Act, R.S.O. 1927, ch. 106, sec. 34, provides that where a way has been enjoyed for the full period of 40 years, the right thereto shall be deemed to be absolute and indefeasible, unless it appears that the same was enjoyed by some written consent or agreement expressly made for that purpose by deed or writing. No such consent or agreement exists.

Mr. Smyth argued that the period comprised in the lifetime of the widow of Richard Pickard should not be considered as part of the statutory 40 years. No authority, however, was cited in support of that argument, and on principle it appears to me

fallacious. Mrs. Pickard was the owner for life of the dominant tenement—an estate of freehold—and the plaintiff as executor of his father had the fee in such tenement from his mother's death until action was brought. There was in the Pickards absolute continuity of title as well as of possession and continuous use of the servient tenement by them as successive owners.

The law as to tenancy for life is, I think, accurately stated in Gale, 10th ed., p. 225, where it is said that “the enjoyment of an easement by a tenant for life in possession will enure for the benefit of the fee simple and be a sufficient foundation for presuming an absolute grant accordingly.” See *Codling v. Johnson* (1829), 9 B. & C. 933.

Even were the origin of the use of the lane by the plaintiff and his predecessors in title more doubtful, effect should, in my opinion, be given to their continuous use of the lane. The only objection ever made by the Gladmans to its use was that the Pickards should not bring their cows upon it to be milked. It should be mentioned that the Pickard family had a field of 6 acres to the north of the lane, and to this their only access was by means of the lane.

In *Halliday v. Philipps* (1889), 23 Q.B.D. 48, and *Philipps v. Halliday*, [1891] A.C. 228, the question was as to the right of Mr. Halliday to the possession of a pew in a parish church. In the Court of Appeal Lord Justice Fry said:—

“The Courts are under an obligation which has been insisted on over and over again, whenever they can, to clothe with legal right long continued and undisputed enjoyment; and in my judgment that obligation rests upon the Court although enjoyment may be shew to have had *de facto* an invalid or illegal or insufficient origin. I think where there has been long usage, long possession, or long enjoyment, even although there may be an original infirmity in the *de facto* commencement, the Court is bound to presume, if it can, that that illegal origin has been altered by something which has occurred in the course of time.”

This view of the law was affirmed in the House of Lords. Lord Herschell said ([1891] A.C. at p. 231):—

“Now I apprehend that where there has been long-continued possession in assertion of a right, it is a well-settled principle of English law that the right should be presumed to have had a legal origin if such a legal origin was possible, and that the Courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title.”

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The same principle plainly applies to such an easement as the plaintiff claims. See observations of my brother Masten in *Abel v. Village of Woodbridge* (1917), 39 O.L.R. 382, 389.

Mr. Smyth urged that at the utmost all the plaintiff was entitled to was the use of the *via trita* in the centre of the lane.

I cannot bring myself to agree with this contention.

One result of so holding is that the defendant would be entitled to enter upon the west side of the travelled way and girdle or cut down the trees planted there by Richard Pickard, and for more than 40 years affording shade and protection from the east wind to the Pickard property. So far as I know, no case decides that such shade and protection constitute an easement, and it is not difficult to imagine cases in which it would be improper so to decide.

Here, however, the circumstances are exceptional. They point to an agreement by Gladman with his partner or to what has been ripened by time into a grant, that the whole lane and not merely the *via trita* should be for their common use. How otherwise account for the fact that the trees were planted and paid for on the one side by Gladman and the other by Pickard? Thus the lane, like the approaches to the two houses, was made to present an appearance of symmetry, and, as the trees grew, no doubt of beauty—a symmetry and beauty which would utterly disappear if the only right of the plaintiff in the lane was held to be along the *via trita*—and the defendant destroyed, as he would have the right to do, the trees planted, in the circumstances stated, along the sides of the travelled way.

In *Attorney-General of Southern Nigeria v. John Holt and Co. (Liverpool) Ltd.*, [1915] A.C. 599, it was contended that the easement claimed was unknown to the law. Delivering the judgment of their Lordships, Lord Shaw of Dunfermline said (p. 617):—

“The law must adapt itself to the conditions of modern society and trade, and there is nothing in the purposes for which the easement is sought inconsistent in principle with a right of easement as such. This principle is of general application, and was so treated in the House of Lords in *Dyce v. Hay* (1852), 1 Macq. H. L. 305, by Lord St. Leonards, L. C., who observed: ‘The category of servitude and easements must alter and expand with the changes that take place in the circumstances of mankind.’”

It was, in my opinion, the manifest intention of Gladman to grant to his partner not merely a right of way through the lane,



but also whatever other advantages might be derived from it by both parties. App. Div.  
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Mr. Smyth also urged that, as the plaintiff and his tenant traversed the lane with automobiles, there was an improper, because enlarged, use of any right originally intended. PICKARD  
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It is quite true that, in the case of an express grant, the owners of the dominant tenement cannot substantially increase the burden of the easement by enlarging its character, nature, or extent as enjoyed at or previous to the date of the agreement: *Great Western Railway Co. v. Talbot*, [1902] 2 Ch. 759. There was, however, no restriction imposed by Gladman on the ordinary and reasonable use of the lane by his partner, and its use by motor-cars in 1927 was as ordinary and reasonable as its use by horse-drawn vehicles in earlier years. I would apply here the observation above quoted from Lord Shaw of Dunfermline. It may be noted that in *Attorney-General v. Hodgson*, [1922] 2 Ch. 429, Peterson, J., observed (p. 438) that a motor-car was within the scope of a grant made in 1861 of a "right of carriage horse and footway." Latchford,  
C.J.

The appeal should be dismissed with costs, without prejudice, however, to the right of the plaintiff to enter action for damages and an injunction in case the defendant again interferes with his reasonable use of the lane.

MASTEN, J.A.:—In this appeal I have had the opportunity of perusing and considering the judgment prepared by my Lord the Chief Justice, and I agree with his statement of facts and his conclusions of law except as to the extent of the right of way claimed in the present case.

There can be no question but that the defendant had such notice of the plaintiff's right as to preclude him from claiming the benefit of the Registry Act, even if he had pleaded it, which he has not done (see the decision of this Court in *Smith v. Thornton* (1922), 52 O.L.R. 492).

With respect to the extent or limits of the way claimed by the plaintiff, I am of opinion both upon the facts and the law, that the action has been launched, the evidence directed, and the argument on this appeal confined to a claim by prescription under the Limitations Act, R.S.O. 1927, ch. 106, sec. 34. On that claim the trial Judge at the close of the evidence found that a right of way had been acquired by prescription, that in the case of a way by prescription the evidence of user is the only evidence of the right, that the extent of the user is the measure of the extent of

App. Div. the right, and that each party used only that portion required  
 1928. for entrance to and exit from his lands. In his subsequent find-  
 PICKARD ings of the 29th March, 1928, he omitted the last finding, but I  
 v. do not understand that he ever resiled from it.  
 KERNICK. I agree with the findings of the trial Judge as above stated:  
 Masten, J.A. see *Finch v. Great Western Railway Co.* (1879), 5 Ex. D. 254,  
 258. The rule of law is well expressed in an Indian case in  
 which it was held as follows: "In a suit for declaration of a  
 right of way plaintiff must prove the particular line over which  
 he claims the right. Mere proof of a right to pass over land  
 without proving the particular route is not sufficient." *Bad-  
 hanath Sugracharji v. Baidonath Seal* (1869), 3 B.L.R. App.  
 118 (Ind.) See English and Empire Digest, vol. 19, cols. 93, 94.  
 The case of *Bowes v. Reid* (1923), 54 O.L.R. 253, is decisive  
 of the plaintiff's right to an easement by prescription. In that  
 case the head-note is as follows:—

"The use of a road began more than 40 years before action  
 under a parol licence from the owner of the land through which  
 the road was made, and had continued ever since without inter-  
 ruption:—

"Held, that the case fell under the latter part of sec. 35 of  
 the Limitations Act, R.S.O. 1914, ch. 75, which makes a right  
 which has been enjoyed in the manner described in the statute  
 for the full period of 40 years absolutely indefeasible unless it  
 appears that it was enjoyed by virtue of some consent or agree-  
 ment expressly given or made for that purpose by deed or  
 writing.

"Parol licence is of no moment unless it is applied for and  
 granted within the period of 40 years, in which case it will  
 negative the enjoyment of the easement as of right for 40 years.

"*Gardner v. Hodgson's Kingston Breweries Co.*, [1900] 1  
 Ch. 592, 600, [1901] 2 Ch. 198, [1903] A.C. 229, 236, fol-  
 lowed."

In the present case the evidence makes it clear that the  
 user by the plaintiff was of a certain well defined *via trita* en-  
 tering from the street by a gate which was customarily kept  
 closed and proceeding northward through the centre of the lane  
 in question toward its northerly end and there turning left to  
 the plaintiff's barn. As trial Judge I might have felt some  
 doubt as to whether the user of this way by the plaintiff had  
 been sufficiently continuous during recent years to enable him  
 to maintain this action, but, after a careful perusal of the evi-  
 dence, I am unable to say that the finding of the trial Judge in

favour of the plaintiff's right is incorrect. On the facts also it is to be observed that not only did the title to the whole lane, 49 feet in width, remain in the defendant's predecessor, but that his predecessor in title used the land as owner, pasturing cows upon it and prohibiting the plaintiff's predecessor in title from using it as a yard in which to milk his cows, which prohibition was at once accepted and acceded to.

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KERNICK.

Masten, J.A.

Upon these facts the extent of the way which the plaintiff is entitled to enjoy must be governed and limited by the user shewn in the evidence and not by the antecedent parol agreement, which, taken by itself without the user, would be incapable of enforcement. The judgment below should be amended by limiting the way to which the plaintiff is entitled to such a width as may be reasonably necessary and convenient for his enjoyment of a passage to and from his barn and shed, with horses, waggon, and automobiles. I refer to the judgment of the late Mr. Justice Street in *Sklitzsky v. Cranston* (1892), 22 O.R. 590, at p. 595, and to the judgment of this Court in *Bowes v. Reid*, 54 O.L.R. 253, at pp. 255 and 256.

If the parties cannot agree upon the exact width which is proper or necessary, following the track which has hitherto been used, the Court may be spoken to.

Notwithstanding the fact that the defendant is entitled, in my opinion, to a substantial modification of the judgment pronounced by the trial Judge, he has yet failed on the main issues which were argued before the Court, and I think that the judgment below should be modified in the way that I have indicated, but that the appellant should pay the costs of this appeal.

ORDE, J.A.:—I have carefully considered the judgments of my Lord the Chief Justice and my brother Masten.

There can be little doubt from the evidence that when the predecessors in title of the present parties laid out and fenced in the so-called lane between the parcels of land upon which their respective dwellings stood, there was some mutual understanding or arrangement as to the user by the plaintiff's predecessor of the 49-foot strip in question, the fee simple of which remained vested in the defendant's predecessor, and it is not improbable that Samwell, the owner of the fee, intended that Pickard should not only use the actual roadway for ingress and egress to and from the rear of his adjoining land, but might also roam over the remaining portions of the 49-foot strip, thereby making such portions a sort of "no man's land" for the benefit of both.



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But the plaintiff's case here rests upon prescription solely, and not upon any agreement, arrangement, or understanding made when the lane was laid out. To give to any such arrangement the full force demanded by the plaintiff would violate every rule against the establishment of such agreements by parol evidence.

I feel myself constrained, therefore, to concur in the judgment of my brother Masten that the prescriptive right of the plaintiff to a right of way, as an easement, over the lane, must be confined to so much thereof as he continuously used during the period in question; and the evidence is quite clear that the part used was the *via trita* from the street to the point where he and his predecessor in title entered his own back-yard and no more. The width of the part so used ought, of course, to be reasonable, and I agree with what my brother Masten says as to this.

One very cogent piece of evidence which tends to limit the extent to which the parties intended the laneway to be used for vehicular purposes is the fact that they together laid out the roadway that was so used and from time to time placed cinders and gravel upon it, and the further fact that there was always a fence across the lane at the street line, and that the entrance to the *via trita* was by means of an opening in the fence, which was at first protected by movable bars and afterwards by a gate. From these facts, I think it is evident that, so far as the right of way was concerned, it was intended by the parties themselves that it should be limited to so much of the strip as was laid out for use as a road to be travelled, and that it was never intended that the plaintiff's predecessor in title might drive vehicles all over the strip of 49 feet at his own sweet will. It may well be that the two men, who were partners and on terms of friendship, intended that the remaining portions of the strip outside the *via trita* might be used by them for some common purpose as I have suggested, but the plaintiff has certainly not proved or attempted to prove any prescriptive right to any such user.

I do not know upon what theory the plaintiff can have acquired by prescription the right to compel the owner of adjoining land to maintain shade-trees for his benefit. The plaintiff claims merely a right of way over the 49 feet and sets up no claim to any easement in respect of the trees.

It might be possible, perhaps, by planting trees upon another's land, to acquire a prescriptive right to an easement that they should remain there, of the nature of those enumerated in



Halsbury's Laws of England, vol. 11, p. 328. But the plaintiff has not only not seen fit to claim any such right, but has not, beyond giving some evidence that the trees on each side of the lane were paid for jointly, sought at the trial to establish it.

The fee simple in the strip is vested in the defendant; and, in the absence of some instrument giving the plaintiff a right to have the trees maintained on the defendant's land, I am unable to see how the plaintiff can rely upon some parol understanding or agreement as to the trees (the exact nature of which is not even sworn to but must be guessed at) as establishing in this action some prescriptive right, merely because the trees have been allowed by the defendant to stand on his own land for more than 30 years. The bargain or agreement by which the trees were paid for jointly may have taken any one of several different forms. It is quite possible and not at all unlikely that the contribution made by Pickard towards planting the trees was the price for the right to pass over Samwell's land. I can see nothing in the evidence to justify the conclusion that Pickard was intended to acquire any rights whatever in respect of the trees themselves.

The judgment should be in the terms stated by my brother Masten.

ROSE, J., agreed with ORDE, J.A.

*Judgment as stated by MASTEN, J.A.*

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[APPELLATE DIVISION.]

BOERICKE v. SINCLAIR.

*Vendor and Purchaser—Agreement for Sale of Land—Purchase-money Payable in Instalments by Deposit in Bank to Credit of Vendor—Time of Essence of Agreement—Default—Deposit not Made in Banking Hours—Right of Vendor to Terminate Agreement—Notice—Forfeiture of Payments Made—Relief from—Unintentional Default.*

The defendant, the owner of certain mineral lands, by a written agreement between himself and the plaintiff B. (June, 1926), gave B. the option of purchasing them for \$3,000, \$200 being paid as a deposit, and the balance, with interest, being payable by instalments on named days, by depositing the same in a named bank to the credit of the defendant on or before their respective due dates. The defendant covenanted to execute a proper transfer of the lands, and deposit it together with a certificate of ownership in the same bank, with a copy of the agreement, and with instructions to the

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bank "to hold the same in escrow" and to deliver the same to B. upon the payments of purchase-money and interest being made in full. In the event of B. failing to make any of the payments, the defendant was to be at liberty, by notice in writing to B., to determine the agreement, obtain delivery of the transfer from the bank, and repossess the lands, and in that event B. was to forfeit to the defendant as and by way of liquidated damages any moneys theretofore paid by him. Time was to be deemed strictly of the essence of the agreement. B. entered into possession and expended money in development work. The defendant executed a transfer and deposited it and his certificate of ownership in the bank. Deposits of some of the instalments were duly made by B. (or his co-plaintiff, to whom he assigned his interest), but an instalment payable on the 22nd August, 1927, was not deposited in the bank on that day. The bank's regular hours during which deposits were received were from 10 a.m. to 3 p.m.; and at 3.15 p.m. the defendant demanded and obtained from the bank the transfer and certificate of ownership, and at 6 p.m. deposited in the post-office a registered letter addressed to B. containing a notice purporting to put an end to the agreement. On the 27th August, the plaintiffs tendered to the defendant the whole of the unpaid purchase-money and interest, but the defendant refused to accept it. The plaintiffs did not tender a deposit at any time during the whole 24 hours of the 22nd August:—

*Held*, that the parties, having stipulated that the payments were to be made by deposit in the bank, must be taken to have meant that the deposits were to be made during the bank's regular "day" for receiving deposits; and, there being thus default, and time being of the essence of the agreement, the plaintiffs were not entitled to a judgment for specific performance.

*Steedman v. Drinkle*, [1916] 1 A.C. 275, and *Brickles v. Snell*, [1916] 2 A.C. 599, followed.

*Held*, however, that the facts shewed mere default in payment and not abandonment, and the plaintiffs were entitled to be relieved from forfeiture of the payments made and should have judgment therefor. *In re Dagenham (Thames) Dock Co.* (1873), L.R. 8 Ch. 1022, followed.

The following statement is taken from the judgment of MULOCK, C.J.O.:—

In this action the plaintiffs seek specific performance of a written agreement between the plaintiff Boericke and the defendant for the sale to Boericke of certain lands, or in the alternative a return of moneys paid to the defendant on account of purchase-money.

The case was tried by ROSE, J., who dismissed the action, and from this judgment the plaintiffs appeal.

The main question involved in the case is whether the defendant had the right to determine, and did determine, an option to purchase certain mineral lands in the township of Creighton, given by the defendant to the plaintiff Boericke.

The facts are as follows. The defendant owned the lands in question, being possibly valuable as mineral lands, and by a

written agreement between him and the plaintiff Boericke, bearing date the 22nd June, 1926, gave to Boericke the option of purchasing them for \$3,000, payable as follows: \$200 as a deposit; \$600 on the 22nd February, 1927; \$600 on the 22nd June, 1927; \$270 on the 22nd days of August, October, and December, 1927, and on the 22nd days of February and April, 1928, and the balance, namely, \$250, on the 22nd June, 1928, with interest, etc., "all of which payments of purchase-money and interest shall be made by depositing the same in the Standard Bank of Canada, Temple Building, at Toronto, to the credit of the optionor (the defendant) on or before their respective due dates." The other material provisions in the agreement are as follows:—

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"4. The optionor covenants with the optionee that he will forthwith execute a proper transfer of the said lands and mining rights to the optionee and deposit the same, together with a certificate of ownership covering the said lands in the said the Standard Bank of Canada, at Toronto, with a copy of this agreement, with instructions to the said bank to hold the same in escrow and to deliver the same to the optionee upon the said payments of purchase-price and the interest thereof being made in full as aforesaid.

"5. In case the optionee shall fail to make any of the payments of purchase-price and/or interest above mentioned at the times aforesaid, the optionor may, by notice in writing to the optionee, addressed to the optionee at the Packard Building, Philadelphia, Penn., U.S.A., determine and put an end to this agreement, and shall be entitled to obtain delivery from the said the Standard Bank of Canada . . . of the said transfer, and thereupon the optionor shall be forthwith entitled to enter upon the said lands and the same to have again, repossess and enjoy, anything herein contained to the contrary notwithstanding, and the optionee shall forfeit to the optionor as and by way of liquidated damages any moneys theretofore paid by him.

"6. Provided that (except as hereinafter mentioned) neither the signing of this agreement nor the payment of any of the said moneys shall bind the optionee to pay the remainder of the said moneys, but the optionee shall always be at liberty to cancel or rescind this agreement by forfeiting the payments already made by him, and upon such cancellation he shall not be in any way liable or responsible for any further payments or to do anything further under this agreement.

"7. Notwithstanding anything hereinbefore contained, it is

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understood and agreed by and between the parties hereto that the optionee hereby agrees and covenants that he will make payment of the \$600 and interest falling due on the 22nd day of February, 1927."

"10. The optionee shall have the right to pay the whole of the said purchase-money in advance of the dates aforesaid.

"11. Time shall be deemed to be strictly of the essence of this agreement."

The plaintiff Boericke, as authorised by the agreement, entered into possession and expended a substantial sum of money in development work. He then sold his interest in the property and in the option agreement to his co-plaintiff Young, who continued expending moneys in development work, the amounts expended by the two plaintiffs amounting in all to about \$14,000, and the plaintiff Young was in possession when this action was begun.

The defendant executed a transfer of the lands and mining rights to Boericke, and deposited the same, with the certificate of ownership, in the bank, in accordance with the requirements of para. 4 of the agreement. The deposits of \$200 and of the two sums of \$600 mentioned in the agreement were duly made, but the sum of \$270 payable on the 22nd August, 1927, was not deposited in the bank, whose regular hours during which deposits were received were from 10 a.m. to 3 p.m., and at about 15 minutes past 3 o'clock in the afternoon of that day the defendant demanded and obtained from the bank the transfer and certificate of ownership above referred to, and at 6 o'clock thereafter mailed in the Toronto post-office a registered letter addressed to Boericke, as required by para. 5 of the agreement, containing a notice purporting to put an end to the agreement, and the defendant contends that thereupon the agreement was determined and that he became entitled to retain the moneys paid.

June 20 and 21. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and MASTEN, J.J.A.

*W. N. Tilley*, K.C., and *J. F. Boland*, for the appellants, contended that by the terms of the bargain the documents were to be held at the bank in escrow. The fact that the documents had been taken from the bank by the vendor relieved the appellants from making the payment due on that day. The escrow was terminated by the vendor and he cannot claim default on the part of the purchaser. The purchaser is bound only to



leave with the bank the money to be placed to the credit of the vendor. He need not see that the money is actually placed to the vendor's credit. Therefore, the plaintiff had the right to make the payment at any hour up to midnight of the day named at which he could arrange with the bank to receive it. The notice which was given at 6 p.m. of that day was a repudiation of the contract which relieved the purchaser from doing anything further under the contract, or it was a forfeiture of the contract. The rights of the purchaser could not be forfeited, because the deed was given in escrow. The vendor in withdrawing the deeds from the bank before default is in the same position as if the deeds had never been deposited. In so doing he took away his ground on which to enforce a forfeiture. In any event, even if there was default, the notice given by the vendor is bad as having been given before default was made. This is not an ordinary option but is an agreement binding on both parties unless they cancel according to the terms of the contract. On payment of the purchase-money the purchaser is entitled to a delivery of the deed. Reference to *Kilmer v. British Columbia Orchard Lands Ltd.*, [1913] A.C. 319; *Stickney v. Keeble*, [1915] A.C. 386; *Steedman v. Drinkle*, [1916] 1 A.C. 275; *Walsh v. Wilaughan* (1918), 42 O.L.R. 455; *Sanderson v. Morton* (1923), 54 O.L.R. 479; *Harrison v. Holland*, [1922] 1 K.B. 211; *Mayson v. Clench*, [1924] A.C. 980; *Baines v. National Provincial Bank* (1927), 96 L.J.K.B. 801.

*W. D. McPherson*, K.C., for the defendant, respondent, argued that the agreement was an option merely, and not a purchase and sale agreement. Where the express covenant occurs, as in clause 7 of the agreement, as to payment of part of the money, which excludes liability as to the balance, it becomes an option agreement and not one of purchase and sale. Default occurred when no payment was made at 3 o'clock, at which hour the bank closed its doors for receiving deposits. The amount could not have been deposited according to the custom of the bank after that hour. As a general rule, a document will be construed most strongly against the party preparing it. This document was prepared by the appellants' solicitor. The first two sums referred to in the agreement are in the nature of a guarantee that the contract be carried out, and therefore they would be subject to forfeiture as in a case of sale and purchase. It is not necessary that a sum should be referred to as a deposit so long as it is in fact a guaranty. There is an expression in the agreement in question that all payments in de-

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fault shall be forfeited, which brings it within the authority of *Sanderson v. Morton* (1923), 54 O.L.R. 479. Reference to *Williams v. Stern* (1879), 5 Q.B.D. 409, at p. 415; *Howe v. Smith* (1884), 27 Ch.D. 89, at p. 101; *Soper v. Arnold* (1889), 14 App. Cas. 429, at p. 434; *March Brothers & Wells v. Banton* (1911), 45 Can. S.C.R. 338; *Labelle v. O'Connor* (1908), 15 O.L.R. 519; *Brickles v. Snell*, [1916] 2 A.C. 599.

November 19. MULOCK, C.J.O. (after setting out the facts as above):—Mr. Tilley contended that the plaintiffs had the whole 24 hours of the 22nd August within which to pay the \$270 due on that day, and in support of that contention cited numerous cases, but those cases turn on the law merchant and statutory law with reference to bills and notes, and have no application here. He also argued that, if the bank, after regular banking hours, chose to accept the money due on that day, that would have been payment within the meaning of the agreement. I am unable to assent to that contention. The parties, having stipulated that the payments were to be made by deposit in the named bank, must have meant that the deposits were to be made during that bank's regular day for receiving deposits, namely, between 10 a.m. and 3 p.m. A literal meaning should not be given to the "day" as contemplated by the parties, but rather one expressive of the sense in which they refer to it (per Bowen, L.J., in *The Moorcock* (1889), 14 P.D. 64, at p. 68, and per Lord Watson in *Dahl v. Nelson Donkin & Co.* (1881), 6 App. Cas. 38, at p. 59). A hiring by the day of, say, a workman at a certain wage per day does not mean that the servant must work the whole 24 hours of that day, but only so long as, having regard to all the circumstances, the parties must have intended. In the present case, at 3 p.m., in my opinion, the time had expired within which the plaintiffs were entitled by the agreement to make the deposit. As a matter of courtesy the bank accepted deposits until the cash was locked up, which was never later than 4 p.m., after which hour it would not accept deposits of cash until the following day. The plaintiffs did not tender a deposit of the \$270 at any time during the whole 24 hours of the 22nd August.

Mr. Tilley further argued that the defendant was bound to leave the transfer of title and certificate of ownership in the bank during the currency of the agreement, and that their withdrawal by the defendant from the bank at 3.15 p.m. was a breach of the agreement, and relieved the plaintiffs from the

obligation to make any payment during their absence, and therefore that the defendant had no right to exercise the privilege given him by clause 5 of terminating the agreement, and that the same was still in full force. As to this latter contention, the answer appears to be that, the parties having expressly agreed that on default in making any payment the defendant should have the right, by notice, to end the agreement, it was no term thereof that, if those documents were withdrawn, the defendant should cease to have that right, and the Court cannot add to it a term which the parties themselves did not see fit to make.

On the 27th August, 1927, the plaintiffs tendered to the defendant the whole of the unpaid purchase-money and interest, namely, \$1,714.09, but the defendant refused to accept the same. The parties having made time the essence of the agreement, and the plaintiffs having made default, there is nothing here to take the case out of the rule affirmed in *Steedman v. Drinkle*, [1916] 1 A.C. 275, and *Brickles v. Snell*, [1916] 2 A.C. 599, that the purchaser is not entitled to specific performance.

The next question is whether the plaintiffs are entitled to relief from forfeiture of moneys paid on account of the purchase.

The learned trial Judge, applying to this case the judgment of the Appellate Division in *Sanderson v. Morton*, 54 O.L.R. 479, held that the plaintiffs were not entitled to such relief. That was a case where the purchaser had abandoned his purchase, and the judgment was that, because of such abandonment, he was not entitled to a return of payments made on account. Some judicial observations made in that case with reference to the consequence of mere default, not abandonment, are *obiter*.

What is the proper inference to draw from the facts of this case? Do they shew abandonment or unintentional default?

In accordance with the terms of the agreement, Boericke paid to the defendant in all \$800 on account of the total purchase-price of \$3,000, entered into possession of the lands, and proceeded to develop the property, expending many thousands of dollars in such work. On the 16th June, 1927, he gave an option to his co-plaintiff Young to purchase his interest in the lands for \$10,000, Young paying him on account \$100 on the 22nd June, 1927. A further sum of \$600 became due to the defendant on the original option given by him to Boericke, but the evidence does not shew whether this sum was paid, or, if so,

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by which plaintiff; but, as the defendant does not complain of its non-payment, it may be assumed that it was duly paid, and as between Boericke and Young it was payable by the latter, and I assume that it was he who paid it.

Young then entered into possession of the lands and continued at considerable cost the development work, and was in possession and carrying on such work when the defendant purported to cancel the agreement.

On the 27th August, 1927, the fifth day after default in payment of the \$270, Young tendered to the defendant not only the \$270 but also the whole unpaid purchase-money and interest, which the defendant refused to accept, and on the 31st August, 1927, the plaintiffs instituted this action.

Thus it appears that the plaintiffs altogether had expended in work of development some \$14,000 and paid the defendant on account of the purchase-price \$1,400, and that Young was still in possession and carrying on the work of development when, on the 22nd August, 1927, the failure to pay the \$270 occurred. In my opinion, these facts shew mere default in payment and not abandonment. In such case the law governing forfeiture of moneys paid on account is, I think, as declared in *In re Dagenham (Thames) Dock Co.* (1873), L.R. 8 Ch. 1022, where Mellish, L.J., says (p. 1025):—

“I have always understood that where there is a stipulation that if, on a certain day, an agreement remains either wholly or in part unperformed—in which case the real damage may be either very large or very trifling—there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty.”

This statement of the law was approved in *Kilmer v. British Columbia Orchard Lands Ltd.*, [1913] A.C. 319.

*Brickles v. Snell* (*ante*) was a case wherein Brickles agreed to sell and Snell agreed to purchase certain lands for \$7,500, of which \$500 was to be paid as a deposit, and the balance as in the agreement mentioned. One term of the agreement was:—“If the purchaser should make default in completing the purchase ‘in the manner and at the time mentioned,’ i.e., March 15, 1912, any money theretofore paid on account might at the option of the vendor be retained by him as ‘liquidated damages,’” and the contract at his option be put an end to. Another term was that time was made in all respects strictly the essence of the contract. The day before that fixed in the agreement for carrying out the contract, the purchaser’s solicitor was suddenly



taken ill and in consequence failed to return the draft deed approved of for engrossment and execution. In other words, the purchaser was not ready on the day fixed for completion of the agreement to carry it out. Acting on such default, the vendor refused to complete the contract, whereupon the purchaser brought an action for specific performance. It was held that such default disentitled him to specific performance. Lord Atkinson, in delivering judgment, however, said (p. 604):—

“It is, their Lordships think, very unfortunate that a claim in the alternative was not inserted for a return of the deposit of \$500, or that, if not originally claimed, liberty should not have been asked to amend the pleading by inserting such a claim, so that there might have been a complete adjudication on all matters in dispute between the parties, and all further litigation have been prevented. That, however, has not been done, and their Lordships therefore can only deal with the issues raised by the pleadings as they stand.”

From this quotation it would seem that if the purchaser in his action had asked for relief from forfeiture of the \$500 and for its return, he would have been granted that relief.

I am of opinion that the facts bring this case within the law as declared in *In re Dagenham (Thames) Dock Co.* (*ante*), and that the plaintiffs are entitled to be relieved from forfeiture of the payments made by them on account of the purchase-money, and should have judgment therefor, viz., \$1,400, but their claim for specific performance should be dismissed. Success being divided, no costs here or below.

MAGEE and HODGINS, JJ.A., concurred.

MASTEN, J.A., being absent on account of illness, took no part in the judgment.

*Appeal allowed in part.*

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## [APPELLATE DIVISION.]

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*Bankruptcy—Preferred Claim of Crown (Province)—Timber Cut by Debtor as Licensee upon Crown Lands—"Rates" Payable by Licensee—Crown Timber Act, secs. 2(1), 18—"Taxes, Rates, or Assessments"—Bankruptcy Act, secs. 125, 133—Crown—Lien—Act of Province of Canada, 1866, 29 & 30 Vict. ch. 43—R.S.O. 1897, ch. 113—Repeal by R.S.O. 1914, sched. A.—3 & 4 Geo. V. ch. 2, sec. 7 (Ont.)—Interpretation Act, R.S.O. 1914, ch. 1, sec. 14.*

The judgment of FISHER, J., 62 O.L.R. 367, was affirmed.

AN appeal by the Attorney-General for Ontario from the judgment of FISHER, J., in Bankruptcy, 62 O.L.R. 367.

November 5. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and GRANT, J.J.A.

*Edward Bayly*, K.C., for the appellant, contended that the provisions of the Bankruptcy Act are not binding upon the Crown in the right of the Province of Ontario. Section 188 of the Act applies only to the Crown in the right of the Dominion. The Provincial Government can create a preferential lien for its debts from any person within the Province: *Gauthier v. The King* (1918), 56 Can. S.C.R. 176, at p. 194; *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437, at p. 442. If the Ontario statutes do not bind the Crown in the right of the Dominion, then, by parity of reasoning, a Dominion statute which does not specifically mention the Province does not bind the Crown in the right of the Province. What the word "Crown" means is a question of interpretation. In Dominion statutes it means the Crown in right of the Dominion, and in Provincial statutes it means the Crown in right of the Province, unless otherwise specifically set out. The provisions of the Bankruptcy Act, in so far as they may be held binding upon his Majesty in the right of the Province of Ontario, to the extent of interfering with the prerogative right of his Majesty to priority of payment of debts due, are *ultra vires*. The prerogative of the Crown to create priority is not ancillary to Bankruptcy legislation. Therefore, the Dominion has not, in this field, a right to take away the prerogative of the Crown in the Province to create this priority. Even if the provisions of the Bankruptcy Act are binding upon the Crown in the right of the Province and are *intra vires*, the claim of his Majesty in right of the Province consists of "taxes, rates, or

assessments," within the meaning of sec. 125 of the Act, and is not to be paid *pari passu* with the claims of ordinary creditors.

G. A. Urquhart, K.C., for the Attorney-General for Canada, respondent, argued that the Dominion Parliament has the right to bind the Province. The Crown need not be mentioned in any statute if by necessary implication it is bound: *Cushing v. Dupuy* (1880), 5 App. Cas. 409; Craies on Statute Law, 3rd ed. (1923), p. 354. By necessary implication the word "Crown" here must mean the Crown in its Provincial prerogative. This is a subject ancillary to Bankruptcy legislation, and therefore within the field of Dominion legislation. Reference to *Stewart v. Thames Conservators*, [1908] 1 K.B. 893, at p. 901; *In re Cardston District U.F.A. Co-operative Association Ltd.* (1925), 7 C.B.R. 413.

H. A. Hall, for the authorised trustee, respondent, submitted that the claim of the Province is not a tax within the Act but merely a sale-price for which the timber licence is granted.

November 19. THE COURT gave judgment holding that the claim of the Crown was neither a tax, a rate, nor an assessment, within the meaning of sec. 125 of the Bankruptcy Act, but was rather for the purchase-money of the logs, as stated in the affidavit of the Deputy Minister of Lands and Forests; and that any preferential lien or right for debts due to the Crown had been taken away by the Act of the former Province of Canada, 29 & 30 Vict. (1866) ch. 43, which was continued in R.S.O. 1897, ch. 113, and, though the latter Act was repealed by sched. A. of R.S.O. 1914, such repeal would not, under sec. 7 of 3 & 4 Geo. V. ch. 2 (Ont., 1913), revive any Act or provision of law repealed by it, nor would it, under sec. 14 of the Interpretation Act, R.S.O. 1914, ch. 1, revive any Act, enactment, regulation, or thing not in force or existing at the time of repeal.

*Appeal dismissed with costs.*

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[APPELLATE DIVISION.]

MURPHY V. CITY OF OTTAWA.

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*Highway—Nonrepair—Snow and Ice on Sidewalk—Injury to Pedestrian—Liability of Municipality—Municipal Act, R.S.O. 1927, ch. 233, sec. 469(3)—"Gross Negligence"—Notice—Findings of Fact of Trial Judge—Appeal.*

Where the finding of fact of a trial Judge is based upon his conclusion as to the credibility of witnesses whose testimony is con-

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flicting, it should not be disturbed by an appellate court except in case of manifest error.

*Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253, *Wilson v. Kinneer*, [1925] 2 D.L.R. 641, and *W. C. MacDonald Regd. v. Latimer, Jasperson v. Plumb* (1928), 63 O.L.R. 43, decisions of the Privy Council, referred to.

In an action for damages for injury sustained by the plaintiff by a fall upon an icy sidewalk in a city, where the city corporation undertook the duty of keeping the sidewalks clear of snow and ice and had an organised system of inspection, the trial Judge found that a dangerous condition had existed unremedied from the evening before the plaintiff's injury up to the time, about 1.30 p.m., when it happened; that the fall was caused by a ridge of ice upon the sidewalk; and that the city corporation were guilty of "gross negligence" within the meaning of sec. 469(3) of the Municipal Act, R.S.O. 1927, ch. 237; and the appellate Court refused to interfere with the findings and dismissed the city corporation's appeal.

*Holland v. City of Toronto* (1926), 59 O.L.R. 628, referred to.

AN appeal by the defendants the Corporation of the City of Ottawa from the judgment of McEvoy, J. (10th September, 1928), in favour of the plaintiff for the recovery from the appellants of \$2,500 and costs in an action for damages for injuries sustained by the plaintiff by a fall upon an icy sidewalk in a city street.

As against the defendant the Garland Company Ltd. the action was dismissed at the trial, and the appellants were ordered to pay the costs of their co-defendant. They appealed from the order as to costs.

October 22 and 23. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and GRANT, JJ.A.

*F. B. Proctor*, K.C., for the appellants, argued that there was no evidence to support the finding of the learned trial Judge that the sidewalk was in an icy condition on the day preceding the accident. The ridge which formed on the sidewalk was caused by temperature varying and causing an intermittent dripping from the snow on the roof of an adjoining building, on the day of the accident. The appellants were not responsible for the snow on the roof and could not have reasonably foreseen this condition. The plaintiff failed to discharge the onus of proving the existence of the ridge for a sufficient length of time to give the appellants such reasonable notice as would suggest gross negligence, and the learned trial Judge erred in not so finding. He also erred in finding that this was a dangerous place which required extra precautions and care on the part of the appellants. The evidence shews that all reasonable diligence was exercised on the part of the appellants in clearing the



walks of this district both on the day of the accident and that previous. Reference to *Holland v. City of Toronto* (1926), 59 O.L.R. 628, at p. 632; *Ince v. City of Toronto* (1900), 27 A.R. 410; *Palmer v. City of Toronto* (1916), 38 O.L.R. 20. The appellants should not have been ordered to pay the costs of their co-defendant.

*Austin O'Connor*, for the plaintiff, respondent, contended that the evidence shewed that the appellants had abundant notice of the dangerous condition of the walk at this point, both in the year 1928 and previous thereto. The evidence also shewed that the appellants allowed the sidewalk itself to remain in a defective condition which caused water to accumulate at this point and create an icy condition. The evidence further disclosed that, in view of the heavy traffic at this point, the city employees did not give sufficiently careful attention to this part of the walk, and that sanding would probably have prevented the accident. This was a continuing condition of which the appellants should have been aware, and the trial Judge was right in so finding. The evidence shewed that no water dripped from the adjoining building on the day in question until after the time the accident occurred, and that the ridge had existed at varying depths from the beginning of the winter.

November 19. The judgment of the Court was read by GRANT, J.A.:—The action against the defendant the Garland Company was dismissed at the trial, and, as no appeal was taken from such dismissal, that company was not represented on the argument of this appeal.

An appeal from the judgment of McEvoy, J. (without a jury), pronounced on the 10th day of September, 1928, in favour of the plaintiff as against the defendants the Corporation of the City of Ottawa for the sum of \$2,500 damages for injuries sustained by a fall upon an icy sidewalk, together with the costs of the action. The Garland Company having been brought in as co-defendants by the city corporation, the latter were condemned to pay the Garland Company's taxed costs. An appeal was taken from this order as to the company's costs, but was dismissed upon the argument.

The plaintiff alleged, and the city corporation denied, gross negligence on the part of the latter, within the meaning of subsec. 3 of sec. 469 of the Municipal Act, R.S.O. 1927, ch. 233.

Upon the appeal, counsel for the corporation contended that there was no evidence upon the record to support the learned trial

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Judge's findings that there was an icy and dangerous condition of the sidewalk in question and that the city had notice of that condition, or, by reason of the circumstances, should be held to have had notice thereof. He contended that, if an icy or dangerous condition did exist at the time and place, such condition had been created so shortly before the happening of the accident that the corporation could not reasonably be held to have been negligent in not having learned of the condition or in failing to remedy the same by the time the accident occurred.

The learned trial Judge has made certain very definite findings of fact against the city corporation, which may be summarised as follows. He finds (1) that "upon the day upon which Mrs. Murphy fell, at about 1.30 in the afternoon, there was, at a place a few feet north of the iron post situate at the edge of the sidewalk in front of the Garland building, a narrow ridge of slippery ice practically of the kind described by these witnesses and that this rendered the spot dangerous for pedestrians;" (2) that the dangerous condition was present at the time (about 8.30 a.m.) when the city patrolman passed over the place in question, and that "if he did not see the ridge, the slippery slope and the dangerous condition, it was gross negligence for which the city corporation must be held responsible;" that the ridge was there on the evening before the accident and continued in practically the same condition at the time when the plaintiff slipped and fell upon it; (3) that Mason and Connell (two of the city employees charged with duties in regard to sidewalks) were grossly negligent in failing to see the mound and in failing to remove it or to remedy the defect by scarifying it or by sanding it; (4) that there was ample time for the place to have been sanded after Connell, Neville, and Mason were there, and before the time of the accident; (5) that the place in question was well known to those who had charge of the cleaning and care of the sidewalks in winter as one where a dangerous condition arose after every thaw and in respect of which care had to be exercised to keep it in a safe condition; and that, upon the evidence, there had been no dripping from the roof of the Garland building during the 18th day of January (the day on which the accident occurred) before the plaintiff fell, or during the night between the 17th and 18th.

It appears, from the reasons for judgment of the learned trial Judge, that he found the city corporation fixed with notice of the dangerous condition of the sidewalk, both by reason of the fact that certain of the city employees, charged with the duty of

looking after the sidewalks and keeping the same in safe condition, had been over this particular portion of the walk on the morning of the day on which the accident occurred and a sufficient length of time before the accident to have remedied the icy and dangerous condition; and also by reason of the fact that this particular piece of sidewalk was known and ought to have been known to the city officials as a dangerous place, where an icy and dangerous condition was usually to be found in winter-time, after a thaw and subsequent freezing up. Upon both grounds the learned trial Judge found the city fixed with notice, and, having failed to remedy the dangerous condition, guilty of gross negligence.

The duty of an appellate court upon the hearing of an appeal from the decision of a trial Judge without a jury, where the appellant seeks reversal of the findings of fact, has been expressed on various occasions by the highest courts in Great Britain, and, it must be confessed, in language not always easy to reconcile with previous statements.

For example, in *Wilson v. Kinnear*, [1925] 2 D.L.R. 641, at the top of p. 646, Lord Dunedin, in delivering the judgment of the Judicial Committee, and pointing out the difference in this regard between the verdict of a jury and the finding of a trial Judge, states, in respect of the latter: "A Court of Appeal has not to consider whether there is any evidence on which the verdict could be reasonably based; it has to consider *whether it, on the evidence, would have come to the same conclusion*, and that is what the Appeal Court did."

On the other hand, the late Viscount Cave, when Lord Chancellor, in *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253, at p. 258, where he also was distinguishing between the verdict of a jury and the finding of fact by a trial Judge, states, in the latter case: "In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly."

And the most recent pronouncement is that of Lord Atkin in *W. C. MacDonald Regd. v. Latimer, Jasperson v. Plumb* (1928), 63 O.L.R. 43, a judgment of the Judicial Committee delivered on the 12th June, 1928, where he states: "No one doubts that where an appeal of fact lies it is within the jurisdiction of an appellate court to reverse a finding of fact; but it is well established that such a course is only to be adopted upon very clear

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proof of error where the case depends upon the credibility of witnesses whom the trial Judge has seen and believed."

One guiding principle or rule appears to emerge from these statements, and that is that where the finding of fact of a trial Judge, sitting without a jury, is based upon his conclusion as to the credibility of witnesses whose testimony is conflicting, his finding of fact should not be disturbed by an appellate court except in case of manifest error.

In the case at bar there was very marked conflict of testimony among the witnesses, and it is manifest that the trial Judge, who saw them in the witness-box, observed their demeanour, and heard them give their testimony, was in a much more advantageous position to judge of their credibility and of the weight to be given to their evidence than would be an appellate court, which must rely only upon the typewritten transcript. If therefore there appears, upon the record, evidence which affords a reasonable support to the findings of fact, we should not, in the absence of manifest error, be justified in disturbing such findings. A careful perusal of the evidence upon the record has led me to the conclusion that the material conclusions of fact of the trial Judge were fully justified. A brief consideration of the evidence will suffice.

The plaintiff, with her daughter and a woman friend, on the 18th January, 1928, at about 1.30 o'clock in the afternoon, was proceeding in a southerly direction along the sidewalk on the east side of O'Connor-street, between Queen-street and Albert-street, in the city of Ottawa. The *locus in quo* is situated in the business portion of the city, and at a place where the pedestrian traffic is heavy. The sidewalk, about 6 or 7 feet in width, was somewhat lower along its centre line than at the edges, there being a slope to the centre of the walk both from the kerb and from the building line. In winter-time, ice formed in the hollow, and, both by the dripping of water from the eaves of the Garland building, and also doubtless from the melting of snow, a ridge or mound would be formed from time to time lengthwise along the centre of the sidewalk. This would become, apparently, quite pronounced, so that pedestrians were in the habit of walking on either side of the centre and not as a rule upon the centre of the sidewalk itself. The plaintiff, when walking with her two companions, slipped and fell upon the ridge or mound or slight elevation (whatever it should be called), and sustained severe injuries for which the learned trial Judge has held the city corporation responsible, finding it guilty of gross negligence within the statute,



and condemning the corporation to pay the damages above mentioned with the costs of the action.

That there was a lump or ridge on the sidewalk, by reason of which the plaintiff slipped and fell, and that the sidewalk was at that point in an icy and dangerous condition, is, in my opinion, manifest from a perusal of the evidence. It is equally manifest that the icy and dangerous condition that was seen by Constable Beemer, McLary, Thompson, Pragnall, Bonfield, and Jones, ought to have been detected and remedied by the city corporation's employees who were charged with the special duty of examining the sidewalk for that very purpose, and who were over and inspected it that very morning. The conclusion seems irresistible that the inspection (if any) must have been most perfunctory. As the accident occurred about 1.30 o'clock in the afternoon of the 18th January, the ridge, and the resulting dangerous condition, must have been created prior to that time.

As appears from his findings above mentioned, the learned trial Judge was convinced that the ridge had existed and continued substantially in its then state, from the day before. This is combatted by counsel for the city corporation, who contended that the ridge had been formed during the morning of the 18th, and after the city's employees had made their rounds in that district; and, as there was no snow-fall that morning, the formation of the ridge was attributed to water dripping from the roof of the Garland building and freezing as it fell. The dripping, if any, must have been caused by snow melting on the roof.

The witness Gorman, who was meteorologist for the Marine and Fisheries Department, stated that there was no snow-fall during the morning of the 18th and only a "trace" on the night before, i.e., from 8 p.m. on the 17th to 8 a.m. on the 18th. A trace he defines as so light a fall that it could not be measured. On the 17th, that is from 8 a.m. to 8 p.m., there had been four-tenths of an inch of snow. On the night of the 16th, and prior to 8 a.m. on the 17th, there had fallen  $3\frac{1}{2}$  inches. It was agreed that the Garland roof was very steep, and some of the witnesses were of opinion that snow would not stay on it. On the 17th, the thermometer registered below the freezing point all day, and also during the following night. On the morning of the 18th, at 8 o'clock, there were  $3\frac{1}{2}$  degrees of frost, and about noon it registered 36 above zero, or 4 degrees above freezing point. The 18th was a cloudy day, the sun being obscured all morning, except for about 10 minutes between 11 and 12 noon. The sun shone also for about half an hour between 12 and 1 p.m., and for another half

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hour between 1 and 2 p.m. The only period, therefore, at which it was not freezing, according to the thermometer, between the morning of the 17th and 1.30 p.m. on the 18th, the time when the accident occurred, was around noon of the 18th, and then it was, at most, only 4 degrees above the freezing point. In the absence of definite evidence to the contrary, the natural inference to be drawn must be that there would be no dripping from the roof, because no thawing, until, at the earliest, around noon on the 18th. Even if there were any definite evidence that water was seen dripping from the roof before the plaintiff fell, that would probably not relieve the appellants if such dripping merely added to the size of the ridge or perhaps increased the danger to pedestrians. However that may be, I have not found any evidence upon the record, nor have we been referred to any, wherein it is stated by any witness that he or she saw water dripping at this place during the morning of the 18th January and up to 1.30 p.m.

Mason (one of the city's employees for keeping the sidewalks in a safe condition) was along this walk about 8.30 or 9 a.m. on the 18th with a plough or scraper. He was called for the defence, but does not suggest that there was any dripping in the morning. He did say that "it was dripping off the roof" between 3 and 4 o'clock in the afternoon, which would be about two hours after the accident.

Neville (another of the city's sidewalk staff) was over this very spot about 8 a.m., armed with pick and shovel, for the express purpose of taking off humps of ice and roughing icy places, to make the walks safe for pedestrians. He didn't see any humps. He also was a defence witness, and at first, when questioned as to "humps" on the walk by the Garland building, he said he "didn't see any," but upon being pressed by the appellants' counsel, he said "there were no humps there." Manifestly the trial Judge did not give credence to his testimony, and, in the light of the other evidence, it is not surprising that he refused to do so. As he was a defence witness, it is to be inferred that, if he had seen any water dripping from the Garland building on the morning of the 18th, he would have testified to that effect, and that, as he did not so testify, he saw none.

No other defence witness makes any suggestion of having seen water dripping before 1.30 p.m. Pragnall, a constable, who had been called for the plaintiff, was recalled for the appellants, and said he saw water dripping about 3 p.m. He also described this as "a dangerous place."

Thompson, a Garland employee, started work about 8.30 or 9 a.m. He was out over that sidewalk about 10 o'clock and saw no dripping from the roof. He was back between 11 and 11.30 and saw no water then.

Orum (a Garland witness) says he cleaned the snow off the roof on the 17th; that there was no snow on that side on the 18th; and that there was no drip from the roof on that side on that day.

Langlois (called for the plaintiff) was a chauffeur in charge of a car standing across the street from the scene of the accident, at the time when it occurred. He says the temperature was so low that he kept his engine running, because he was afraid it might freeze up. He speaks of the icy condition of the walk where the plaintiff had fallen; says there was no water there, and nothing coming from the roof at that time.

Brady, another Garland employee, says there was no drip from the roof at half past one o'clock, but that there was about 3 p.m.

Jones (an Ottawa business man, called as the plaintiff's witness) says there was no drip from the roof at 2.30 p.m.

In face of the above testimony, it seems to me quite useless to contend that the lump or ridge of ice on the sidewalk was formed on the 18th, the day of the accident.

I am of opinion that the conclusion reached upon the evidence, by the learned trial Judge, that the condition existed, at least, from the evening before, i.e., the 17th, is the only reasonable conclusion to which the Court could come. Further, the testimony regarding the existence and continuance of a dangerous condition being conflicting, the application of the rule as to the duty of an appellate court (*supra*) makes it improper for this Court to disturb the findings of the trial Judge in respect of these points.

That being so, it remains to consider the question of the appellants' liability for damages under the statute. Gross negligence must be alleged and proven. It should be noted here that the Corporation of the City of Ottawa has itself assumed the duty of caring for its highways and sidewalks and of keeping them in a safe condition. This duty has not been cast by the city upon the owners of the adjoining property, as is the case in many other municipalities. In Ottawa, apparently, a proper and efficient organisation has been established for these purposes, if the men employed were competent and did their duty. Each morning during the winter-season, these men patrol the streets for the express purpose of seeing that the walks are in a safe condition, and, if found to be otherwise, then to do what is necessary to remove the danger. Mason and another city employee were the patrolmen

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covering the district in question, and passed over this sidewalk about 8.30 or 9 a.m. on the day of the accident. As already stated, the evidence accepted by the trial Judge shews quite clearly that the icy and dangerous condition existed at that time, and should have been apparent to them, as it appears to have been to others. According to the evidence of Mason, they could have remedied the defective and dangerous state of the sidewalk with the pick and shovel with which they were equipped. Further, according to the evidence of their foreman, Connell, they could have sanded the place within the space of from half an hour to an hour after notice received. In the light of these facts, it seems to me to be beyond question that there has been shewn, on the part of the appellants, that "very great" negligence which is required to be established in order to found liability. This conclusion is greatly strengthened when one considers also the evidence as to the existence of the dangerous condition at this particular place from time to time, not only during the then winter-season, but also in other years. As supporting this conclusion, the evidence of Thompson, Constable Boehmer, Surveyor Lewis, Neville, the city employee who had "seen worse places," Pragnall, Nelson, the city superintendent, and Connell (city foreman), may be referred to.

Having in mind the conclusion of fact just mentioned, and the resulting duty on the part of the city to take special care in regard to a place known to be likely to become dangerous, from time to time, during the winter-season, doubtless due in part at least to the defective condition of the sidewalk itself, and the learned trial Judge having found that "very great negligence" which renders the appellants liable, I am of opinion that an appellate court would not be justified in disturbing that finding. On the contrary, after perusal of the evidence, I think the finding is fully supported.

The circumstances are, in some material respects, very similar to those existing in *Holland v. City of Toronto*, 59 O.L.R. 628, where the decisions of the Supreme Court of Canada and of the Second Divisional Court are to be found. In my judgment, therefore, this appeal should be dismissed, and with costs.

*Appeal dismissed.*

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## [APPELLATE DIVISION.]

VAN CAMP V. ANDERSON AND CARTER.

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*Negligence—Collision of Motor-vehicles upon Highway—One Vehicle Struck by the other Running up on Sidewalk—Injury to Person on Sidewalk—Whether both Motorists Guilty of Negligence Causing Injury—Disregard of Rule of Road—Highway Traffic Act, R.S.O. 1927, ch. 251, sec. 35—Ultimate Negligence—Conduct in Sudden Emergency—Quantum of Damages—Increase on Appeal—Costs.*

At the intersection of two streets, B. and H., in a city, the motor-car of C. struck that of A., with the result that the latter mounted the sidewalk and struck the infant plaintiff, who was standing thereon, injuring her seriously. In an action against both C. and A. to recover damages arising from the injury to the infant, the trial Judge found that the defendant C. was guilty of negligence causing the collision, because he broke the statutory rule of the road giving the driver on the right-hand side the right of way; and that A. was also guilty of negligence causing the collision because he made a left-hand turn against the traffic upon H.-street, a much-travelled highway running east and west, with street-railway tracks and cars upon it. The trial Judge assessed the infant plaintiff's damages at \$7,500 and those of her co-plaintiff (her father) at \$1,400, and directed judgment to be entered against both defendants for those amounts with costs, fixed at \$150:—

*Held*, by the majority of the Court, upon appeal by the plaintiffs and cross-appeals by both defendants, that the collision was caused solely by C.'s carelessness in endeavouring to cross B.-street in front of A.'s car, and that A.'s intention to make a left-hand turn, or his swerving to the left, had nothing to do with the collision.

Having regard to the provision of the Highway Traffic Act, R.S.O. 1927, ch. 251, sec. 35, and to the circumstances of the case, it was the duty of C. to yield the right of way to A.; and C., not having done so, was alone guilty of negligence which caused the collision. Nor could A., by the exercise of due care after the collision, have avoided injuring the infant plaintiff.

A. had to deal with a serious and sudden emergency wherein human life was imperilled and his conduct was not to be judged as in a case of voluntary negligence.

*Jones v. Boyce* (1816), 1 Stark. 493, followed.

The appeal of A. was therefore allowed with costs and the action as against him dismissed with costs, to be added to the plaintiffs' costs of action and to be recoverable from C.

GRANT, J.A., dissented, being of opinion that both defendants were responsible, as found by the trial Judge.

The damages allowed to the infant plaintiff were, upon her appeal, increased to \$10,000, upon the ground that several important factors relative to the question of the quantum of damages were not considered by the trial Judge, or, if considered, were treated as being of little importance.

*Clinton v. County of Hastings* (1923), 53 O.L.R. 266, *County of Hastings v. Clinton*, [1924] S.C.R. 195, [1924] 2 D.L.R. 217, followed.

The Court had no power to interfere with the trial Judge's discretion in fixing the amount of the plaintiffs' costs of the action.

AN action for damages for injuries sustained by the plaintiff Jean VanCamp, an infant, by being struck by the defendant An-

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derson's motor-car when she was upon the sidewalk of a highway in the city of Toronto, and for loss and expense incurred by the father and co-plaintiff of the infant by reason of her injuries.

The defendant Carter's car struck Anderson's car and Anderson's car then struck the infant plaintiff.

Both defendants were charged with negligence causing the injury to the infant plaintiff.

April 19 and 20. The action was tried by MEREDITH, C.J.C.P., without a jury, at a Toronto sittings.

*Gideon Grant*, K.C., for the plaintiff.

*T. N. Phelan*, K.C., for the defendant Anderson.

*F. J. Hughes*, for the defendant Carter.

April 20. MEREDITH, C.J.C.P. (after hearing the evidence and argument):—I find that the infant plaintiff's injury was caused by the negligence of each of the defendants, and that accordingly each of them is answerable for the whole amount of damages to be awarded. But I find that their negligence was not equal. I find that, if the law allowed it, judgment should go against the defendant Anderson for 60 per cent. of the damages and against the other defendant for the remaining 40 per cent.

I find that the defendant Carter was guilty of negligence in breaking the statutory rule of the road giving the driver on the right-hand side the right of way. I do not find any other negligence upon his part. If he turned to the left in the emergency, I do not think that he can be legally to blame for that. If he could, it would be very much less than the blame to be attributed to Anderson for his course after the accident.

I find that Anderson was guilty of negligence in carelessly making a left-hand turn against the traffic on such a street as Harbord-street. I think it is a common law and common sense duty that no one should turn against the traffic without great care in such a place as that where this accident happened.

Anderson saw Carter's car, he saw the danger, and ought to have stopped or taken some other means of avoiding the accident, even though he may have been in the right in regard to the right of way, because every one must take reasonable care to avoid injury by another even if that other is in the wrong. The donkey case, with which every one is familiar, laid down the rule very clearly, and it has been adhered to ever since. Anderson, instead of stopping or lessening his speed and letting Carter go by, even if Carter were in the wrong, accelerated his speed, with the result that this collision took place. After that, Anderson's car turned to

the right to some extent and went diagonally across the intersection and ran up on the sidewalk and injured the girl, against whom there is nothing said in the way of negligence. I am quite sure that a careful and able driver might easily have avoided that, but I am not able to say that in this emergency a driver of ordinary ability could have saved the situation. As I have often said, although there should be no need to say it, we are not to judge the driver in an emergency of that kind as if he were sitting in court here quietly saying what he should and should not have done. But I think it is fair, having regard to all the circumstances of the case, to say that he was more to blame in a moral sense, though not in a legal sense, than the defendant Carter.

In the really appalling dangers, deaths and injuries, in highway traffic of these days, great care must be exacted from all engaged in it, especially those who drive death and injury dealing cars; to use a microscope to endeavour to find a means of putting the blame for an injury upon one of two or more who have caused it, in a case such as this, in which there could have been no injury but for the separate act of each, is to give great encouragement to car drivers to take risks, and cause deaths and injuries, in the hope of the blame being put upon the other fellow. It is the law's duty to prevent, not to encourage, dangerous conduct. A left-hand turn is so dangerous a thing as to be prohibited in many places.

That brings me to the question of damages. It is always a difficult question, as has been pointed out by very eminent Judges, but is made much less difficult by them. The rule of common law, and of common sense, prevents a judge or jury attempting to give full compensation in cases of personal injury; no damages, however great, can replace a lost leg: the rule is "reasonable compensation under all the circumstances of the case;" and one of those circumstances is, the question whether the misfortune may not prove to be a fortune, as it did in the case of the Cabinet member and Supreme Court Judge, referred to in the argument, who, but for the loss of a leg, should doubtless have always remained a poor farmer: see *Rowley v. London and North Western Railway Co.* (1873), L.R. 8 Ex. 221, and *Phillips v. London and South Western Railway Co.* (1879), 5 Q.B.D. 78, at pp. 83-4. There are some cases where a good deal more may be given, than would fully compensate, that is in cases where exemplary damages are properly imposed, that is to say where some one has done something in a high-handed manner, a manner for which he ought to be made an example of by way of damages to prevent others

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from adopting a high-handed manner and riding rough-shod over the rights of other people.

But there is nothing of that sort in this case. Each of these defendants regrets deeply that this girl was hurt. So that it comes down to a question of what are reasonable damages under all the circumstances of the case.

After the best consideration I can give the case, I adhere to the view I expressed that \$7,500 is ample. The girl must go through life with one wooden leg, if I may use that expression. But wooden legs, in these days are not like the stumps they had in the old days—that they applied to mariners who lost their legs, inserting the stump in boiling tar and when the time came fitting a wooden stump. Art has brought the artificial limb to a state in which the loss is very greatly relieved. This girl is young, and in a short time, it is common knowledge, that she will be able to move about, even with the shortest of short skirts, without much evidence that one leg is real and the other a false one. She can have that artificial one made in any shape she pleases, which may be an advantage over natural limbs.

And I have always to refer to the fact, which is common knowledge, that an accident of this sort may not be a wind that blows nothing but ill to the person who suffers it. If it should turn out that this young woman by reason of this accident is disabled from becoming a cook—a cook still although it may be of a higher grade—and if she turn her attention to other occupations, as far as money is concerned it may turn out for the better rather than the worse.

Still she has only one real leg: it is a great loss to her. But \$7,500 is a large sum of money. In Court, I understand, they have now reduced the interest from 6 to 5 per cent. If it be only 5 per cent. it means \$375 a year for life and the nest-egg still remains. That is a good deal of money, and it will help this girl all through her life—perhaps in actual money, if you could measure it in that way, more than if she had not met with this accident. It is true she may not have as many suitors by reason of an artificial limb, but it may be true that if some one seeks her and obtains her he will be a better husband than if she had two legs, for a man who cares enough for a woman with one leg is likely to be true to her through life. Was it not Othello who was cared for all the more for all that he had gone through?

I just mention this for the purpose of shewing how difficult it is to take into consideration everything and measure it in money. I feel that this girl receives reasonable damages under all the



circumstances of the case at \$7,500.

In regard to the father's claim counsel have agreed that it should be \$1,400.

There will be judgment accordingly, and the plaintiffs will have their costs fixed at \$150. I fix them at that sum because I can do so now far better than a taxing officer, because a taxing officer would not know the waste of time in calling witnesses who did not help the Court in any way, witnesses that ought not to have been called. I do hope that solicitors will try to proceed as professional men should, that is, to adduce only evidence that is material, not to call the whole countryside to prove something that they do not know anything about.

I fix the costs to be paid by these defendants at \$150.

The plaintiffs appealed and both defendants cross-appealed from the judgment of MEREDITH, C.J.C.P.

June 7 and 8. The appeal and cross-appeals were heard by MULOCK, C.J.O., MAGEE, HODGINS, and GRANT, JJ.A.

*Gideon Grant*, K.C., for the plaintiffs, contended that the damages allowed the infant plaintiff by the trial Judge were inadequate. In any event the trial Judge erred in not allowing the plaintiffs the full taxable costs of the action.

*T. N. Phelan*, K.C., for the defendant Anderson, argued that there was no evidence that the collision or impact between the motor-vehicles, driven by the defendants Anderson and Carter, respectively, was the result of any act of negligence on the part of the defendant Anderson. A man in an emergency is not to be held responsible for not using measured judgment and is entitled to assume that a driver on his left will obey the law and yield the right of way. The trial Judge erred in not finding that the infant plaintiff's injuries were the result of an unavoidable accident, or, in any event, that they were not the result of any negligence on the part of the defendant Anderson. Reference to *Levi v. Reid* (1881), 6 Can. S.C.R. 482; *Cossette v. Dun* (1890), 18 Can. S.C.R. 222.

*F. J. Hughes*, K.C., for the defendant Carter, admitted that the defendant Carter was wholly or in a large measure responsible for the collision, but argued that after the collision a new situation arose in which the defendant Anderson could and should have stopped his car and so avoided the accident. The trial Judge erred in not so finding. Reference to *Ballantine v. International Railway Co.* (1927), 61 O.L.R. 273.

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November 19. MULOCK, C.J.O.:—This is an action to recover damages because of personal injury to the infant plaintiff growing out of an automobile accident. It was tried by Meredith, C.J.C.P., who found both defendants guilty of negligence causing the injury and awarded as damages to the infant plaintiff the sum of \$7,500 and to her father, Silas Ezra VanCamp, the sum of \$1,400, with costs fixed at \$150.

The injury complained of arose out of a collision between two automobiles, one driven by the defendant Carter, and the other by the defendant Anderson, which occurred on the south-west corner of the intersection of Borden-street and Harbord-street, in the city of Toronto, Carter's car striking Anderson's and the latter then striking the infant plaintiff and causing the injury complained of. All parties appealed from the judgment.

The plaintiffs' grounds of appeal are that the damages allowed the infant plaintiff are inadequate and that the plaintiffs should have been allowed taxable costs. The defendant Anderson's ground of appeal is that he was not guilty of negligence causing the injury. The defendant Carter in his grounds of appeal admits that he was partly responsible for the collision, but contends that it did not cause the accident to the infant plaintiff—that it was caused solely by Anderson's negligence. There is no material conflict of evidence, and, therefore, an appellate court is in as good a position as was the trial Judge to draw the proper inferences from the facts, which are as follows:—

Borden-street and Harbord-street intersect each other at about right angles, Borden-street running north and south and Harbord-street east and west. In the central part of Harbord-street are two street railway tracks, the vehicular strip of Harbord-street north of the tracks being 13 ft. 5½ in. in width.

On the occasion in question Carter was driving westerly towards Borden-street along this strip except that his southerly wheels were just south of the north rail of the north track, and Anderson was driving southerly along the west side of Borden-street towards Harbord-street. When Carter's car had about reached the east kerb of Borden-street produced, Anderson's car had already entered upon the intersection of the two streets, the rear end of his car being then about in line with the north kerb of Harbord-street produced. Thus Anderson's car was then directly in Carter's path and was materially nearer the point where the collision occurred than was Carter's. When Carter's car was about to enter upon the intersection it was then about 40 feet easterly of Anderson's, its speed was about 15 to 18 miles an

hour, and that of Anderson was about from 8 to 10 miles an hour. They then saw each other, and Anderson then extended his left arm from the left side of his car and held it extended as he proceeded southerly, as a signal to Carter that he intended to make a left turn, and Carter does not deny seeing this signal.

With the exception of the defendants' cars the whole intersection was then absolutely free from vehicular traffic and there was nothing to prevent Carter seeing continuously the signal and Anderson's car until he struck it. Each as he entered the intersection slightly increased his speed, Anderson increasing his to about 12 miles an hour. Carter admits increasing his speed but how much he does not say. He admits that before reaching the intersection his speed had been about 18 miles, reduced to about 12 on reaching the intersection, and that he then increased it (using his words), "as you generally do when you see the intersection is clear." Carter had intended to continue westerly across Borden-street, and there was nothing to have prevented his crossing behind Anderson's car, but, doubtless with the intention of crossing in front of Anderson, he changed his course to a south-westerly direction. There is no evidence that Anderson became aware of this change of direction until he had reached the devil-strip, when he discovered Carter's car within 6 or 8 feet of him on his left and about to strike him, whereupon he endeavoured, but unsuccessfully, to avoid a collision by turning his car towards his right.

The impact together with Anderson's effort to avoid a collision resulted in his car taking a south-westerly direction, the left wheels crossing the kerb and mounting the sidewalk at the south-west corner of the two streets at a point about 8 feet west of the west kerb of Borden-street. Just in front of him on the sidewalk were a number of people who ran in various directions, and, to avoid striking any of them, Anderson turned his car towards the west in order to return to the vehicular portion of Harbord-street.

The plaintiff and two companions were standing on the sidewalk near the south-west corner, and, hearing the noise caused by the collision, looked in the direction whence it came and saw Anderson's car coming south-westerly towards them, whereupon they ran westerly along the sidewalk, but before Anderson had succeeded in returning to the pavement his car struck the infant plaintiff at a hydrant situate just inside the kerb, thereby causing the injury in question.

At the time of the collision the front end of Anderson's car was within about 10 feet of the point where it mounted the side-

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walk, and thereafter it ran between 20 and 25 feet before striking the infant plaintiff. The plaintiffs put in the following examination of Carter for discovery:—

“Q. What direction was your car facing at that time (meaning at the time of the collision)? A. South.

“Q. Directly south? A. Directly south, yes.

“Q. Where did you intend going? A. West.

“Q. When did you make this turn to the south? A. Immediately that I saw Anderson was coming on from the corner I turned south to avert the collision.

“Q. You two had the street to yourselves as far as motor or vehicular traffic goes? A. Practically, yes.

“Q. Did you see Mr. Anderson’s car from the time you first saw him 35 feet up until the time he came out on the intersection? A. Yes, I could see his car all the time.

“Q. He was on your right hand? A. He was on my right hand, yes.

“Q. You watched him from the time you entered on the intersection, you kept on going and kept watching him, is that right? A. No, I cannot say I did keep watching him, but I saw him coming and expected he would stop as he intended, and the next I saw him he came sudden and I swerved then.

“Q. Had you stopped then? A. No, but I had increased my speed to cross the intersection as you generally do when you see the intersection is clear.

“Q. You both increased your speed as you entered on the intersection? A. Yes.

“Q. Didn’t you think he was going to make a left-hand turn? A. I would not expect any man would make a left-hand turn without seeing the coast was clear, especially on a through street.”

The learned trial Judge found both defendants guilty of negligence, the only negligence which he found against Carter being that of breaking the statutory rule of the road giving the car on the right-hand side the right of way. His finding against Anderson is in these words: “I find that Anderson was guilty of negligence in carelessly making a left-hand turn against the traffic on such a street as Harbord-street. I think it is a common law and common sense duty that no one should turn against the traffic without great care in such a place as that where this accident happened. Anderson saw Carter’s car, he saw the dan-



ger, and ought to have stopped or taken some other means of avoiding the accident. . . Anderson, instead of stopping or lessening his speed and letting Carter go by, even if Carter were in the wrong, accelerated his speed, with the result that this collision took place."

Carter, in his cross-appeal, admits that he was partly responsible for the collision, but contends that it did not cause the injury to the plaintiff—that it was solely attributable to the negligence of Anderson after the collision.

With respect, I am unable to agree with the finding that Anderson was guilty of negligence. He entered upon the intersection slightly before Carter and proceeded southerly at a reasonable rate of speed, signalling by his extended arm to Carter that he intended to turn easterly along Harbord-street. When he entered the intersection he saw Carter's car, then easterly of the east kerb of Borden-street produced and some 40 odd feet away; and, being on Carter's right, he was entitled to assume that Carter would obey the statute and yield to him the right of way. I fail to discover any evidence that supports a finding that Anderson's acceleration of speed resulted in or played the slightest part in occasioning the collision. A moment before Anderson had seen Carter some 40 feet away, under circumstances which fully warranted him in assuming that Carter would not only obey the statute but also as a careful man would not attempt to pass in front of him, and it was only when too late to avert a collision that Anderson discovered the possibility of it happening.

Carter's explanation of his conduct, in my opinion, wholly fails to justify it. He says: "I saw him coming and expected he would stop as he intended." There is no evidence that Anderson intended or manifested any intention to stop. To the question "Didn't you think he was going to make a left-hand turn?" his answer is equally valueless as an excuse. He said: "I would not expect any man would make a left-hand turn without seeing the coast was clear, especially on a through street." There was at the moment no other vehicular traffic on the intersection, and the whole "coast" on Anderson's left was clear.

Apparently, in the opinion of the learned trial Judge, Anderson's responsibility for the collision hinged upon his "carelessly making a left-hand turn against the traffic on such a street as Harbord-street." No one should carelessly make a turn either to the left or to the right, but the condition of the traffic on Harbord-street at the moment did not make it careless on Anderson's part to turn, if he did, to the left. But it is to be observed

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that up to the time of the collision Anderson had not actually turned to the left. He was still on the west side of the centre line of Borden-street, though as he proceeded southerly he had swerved slightly towards the left.

The Highway Traffic Act, R.S.O. 1927, ch. 251, sec. 35, enacts that "where two persons in charge of vehicles . . . approach a cross-road or intersection at the same time, the person to the right of the other vehicle . . . shall have the right of way." Further, the circumstances in this case, in my opinion, made it the duty of Carter to yield to Anderson the right of way, and by his not having done so Carter alone was guilty of negligence which caused the collision.

In my opinion, the fair inference from the evidence is that the collision was caused solely by Carter's carelessness in endeavouring to cross Borden-street in front of Anderson's car, and that Anderson's intention to make a left-hand turn, or his swerving to the left, had nothing whatever to do with the collision. The width of the vehicular portion of Borden-street is 24 feet, and when Anderson entered the intersection he was west of the centre line of Borden-street, and in proceeding southerly was always westerly of the centre line, though taking a slight "swerve" towards the east. Carter was watching Anderson's movements and knew his intentions and was at no stage taken by surprise. Nevertheless he recklessly accelerated his speed in order to cross Borden-street in front of Anderson, and was alone responsible for the collision.

I now proceed to deal with Carter's contention that, notwithstanding the collision, Anderson, by the exercise of due care, could have avoided injuring the infant plaintiff.

A moment before the impact Anderson discovered that a collision was imminent and at once turned his car towards his right. This was the only direction in which he could have turned with any chance of avoiding a collision, and any reasonable person would have taken that chance. It is not improbable, though there is no evidence on the point, that, in the excitement caused by an impending accident, Anderson put his foot on the accelerator, thus imparting additional speed to his car, which when struck was within 10 feet of the kerb, and mounted the sidewalk taking the course above set forth. Anderson had to deal with a serious and sudden emergency wherein human life was imperilled and his conduct must not be judged as in a case of voluntary negligence: *Jones v. Boyce* (1816), 1 Stark. 493.

In his effort to avoid injuring the plaintiff his conduct seems to have been that of a reasonable person under similar circumstances, and I do not think he was guilty of any negligence after the collision, which was the direct result of Carter's negligence in striking Anderson's car.

For these reasons, I think the appeal of Anderson should be allowed with costs and that the action against him should be dismissed with costs, the same to be added to the plaintiffs' costs of action and recoverable from Carter.

With reference to the appeal of the plaintiffs for an increase in the damages awarded to the infant, for the reasons mentioned by my brother Grant in his reasons for judgment, I think the damages should be increased to \$10,000.

MAGEE and HODGINS, JJ.A., agreed with MULOCK, C.J.O.

GRANT, J.A.:—An appeal by the plaintiffs and cross-appeals by the two defendants from the judgment of the trial Judge, the Chief Justice of the Common Pleas, dated the 20th April, 1928, whereby he found both defendants guilty of negligence in connection with an automobile collision at the intersection of Harbord-street and Borden-street, in the city of Toronto, and awarded to the infant plaintiff the sum of \$7,500 damages for injuries sustained by her and the further sum of \$1,400 to her father and co-plaintiff for consequential damages sustained by him.

The plaintiffs' appeal is as to the quantum of damages, and also as to the disposition made by the learned trial Judge of the costs of the action, which he limited to the sum of \$150.

Each of the defendants, by cross-appeal, sought to evade liability altogether and to cast the entire liability on his co-defendant.

At the conclusion of the argument I was of opinion that both defendants had been negligent, and that the finding to that effect by the learned trial Judge should be sustained. I was also of opinion that the learned trial Judge, in arriving at the amount of damages which should be allowed to the infant plaintiff, approached the question, if I may so state without disrespect, with an erroneous view as to the basis upon which the amount of damages should be ascertained. I was also of opinion that there was not disclosed in the record any sufficient ground for depriving the plaintiff of her properly taxed costs, or for penalising her, as was done by the fixing of the costs at \$150. In so doing, however, the learned trial Judge appears to

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App. Div. have exercised the discretion vested in him in that regard, and  
1928. as his error (if error there was) was not in adopting any wrong  
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v. as, under the authorities, to justify interference by an appellate  
ANDERSON court, I do not think that this Court would be authorised to  
AND interfere with his exercise of discretion on the question of costs.  
CARTER.  
Grant, J.A. Upon the other questions already mentioned, a careful  
perusal of the evidence and consideration of the arguments and  
authorities have not altered the views which I entertained at  
the close of the argument, notwithstanding the fact that, in this  
respect, I find myself (with regret) at variance with the other  
members of the Court.

I am of opinion that both the defendants Anderson and  
Carter were guilty of negligence causing or contributing to the  
infant plaintiff's grievous injury.

As to the defendant Carter, it seems to me that there can  
be no serious question as to his liability, and upon this point I  
find myself in agreement with the views expressed by my Lord  
the Chief Justice of this Court.

On the other hand, with great respect for those who enter-  
tain a different opinion, I think that the defendant Anderson  
was guilty of negligence both before and after the collision  
between his automobile and that of his co-defendant Carter.  
At the same time, I think that his negligence, after the impact  
of the two cars, was greater in degree than his want of care  
before such impact.

It is to be noted, and it is not without some significance,  
that neither Anderson nor Carter went into the witness-box,  
and the only evidence given by them is in the form of questions  
and answers taken from their respective examinations for dis-  
covery, and put in as part of the plaintiffs' case. The following  
references are made to Anderson's testimony on his examina-  
tion for discovery, as thus put in by the plaintiffs, unless it  
is otherwise specifically stated.

When Anderson first saw Carter's car approaching, Ander-  
son was 6 or 8 feet north of the north kerb of Harbord-street,  
and he was travelling approximately less than 10 miles an hour,  
"easing into probably eight" (to use his own language).

Carter's car was then about 40 or 50 feet east of him (30  
feet east of the easterly kerb of Borden-street), and he thinks  
was travelling 12 to 15 miles an hour. When Anderson was  
passing south of the north sidewalk on Harbord-street, Carter's  
car, he thinks, was 30 to 35 feet away from him and had slowed



down to about 12 miles an hour. He thinks Carter's car was running along between the tracks and the kerb on Harbord-street. He further states that, when the front wheels of his own car were probably on the devil-strip, he saw Carter's car 6 or 8 feet away. The collision took place almost instantly thereafter.

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According to the measurements given on the blue print, Anderson's car, upon his own testimony, must have travelled over 30 feet from the time when, at 6-8 feet north of the kerb, he had seen Carter's car 40 or 50 feet east of him; and Anderson's car had to go an additional 10 or 12 feet (its own length) in order to be clear.

Furthermore, it is apparent from Anderson's own evidence, as well as from the testimony of the independent and disinterested witness Long, that Anderson was actually turning toward the east at the time of the collision.

Long says:—

"Q. And as the cars came to the corner did you see the relative position of the Anderson and the Carter cars? A. I did.

"Q. Will you describe to the jury how they approached the corner? A. Mr. Anderson's car was proceeding south, made a slight inclination to the east to go east on Harbord-street.

"Q. That is, he made as though he were turning east on Harbord? A. Yes, and about the same instant Mr. Carter's car came into view and went over towards the centre of the intersection and struck Mr. Anderson's car at the side. . . .

"Q. And Anderson had turned his car as though to go east, you say? A. Just slightly."

According to this witness, the two cars came to the intersection about the same time.

"Q. About the same time you saw Mr. Carter's car come to the intersection? A. Yes.

"Q. That is, they got to the intersection at practically the same time? A. About the same time."

Although Anderson reached the intersection first, yet Carter's car was only 10-15 feet away.

On the question of his turning east, Anderson's testimony on his examination for discovery was:—

"Q. When did you first begin to turn? A. I was at that point when I saw him approaching me.

"Q. You were where? A. On the devil-strip, say.

"Q. Your front wheels? A. Probably."

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And Carter's car was then 6 to 8 feet from him.

"Q. Whereabouts was his car when you next saw him, that is the second time you saw him? A. 6 or 8 feet from me."

A comparison of the distances to be travelled by the two cars, respectively, after Anderson first saw Carter's car approaching, bearing in mind that Anderson appears to have realised that Carter's car was travelling at a greater rate of speed than his own, leads to the conclusion that a greater degree of care should have been exercised than was displayed by Anderson.

The learned trial Judge finds that Anderson was making a left-hand turn against the traffic, and, in the light of the evidence above quoted, if he believed it, as he evidently did, I fail to see how an appellate court is justified in reversing his finding. It is true that Anderson had the statutory right of way, but that right does not avail if the person enjoying it fails to exercise that reasonable care the exercise of which would have enabled him to avoid an accident. The possession of the right of way, when such right is insisted upon by a stubborn driver, may prove of very doubtful value, if it leads him to ignore or shut his eyes to other factors which ought to be considered. Notwithstanding his statutory right of way, if, by the exercise of reasonable care, he could have avoided the accident, he is guilty of negligence.

*Hanley v. Hayes* (1924), 55 O.L.R. 361, as applied by the Second Divisional Court in *Macdonald v. Tavistock Milling Co.* (1925), 28 O.W.N. 61, at p. 62, makes quite clear the legal duty imposed upon the driver who enjoys the statutory right of way to avoid an accident if, by the exercise of reasonable care, he is able to do so. Anderson saw Carter's car approaching the intersection at a higher rate of speed than his own, and not much farther away, and I think any careful driver would then have foreseen that there was very evident risk of collision, if both cars continued as they were going. Instead of having his car under complete control, so that he could stop or turn to the right, if the event should so require, in order that an accident might be avoided, and instead of being on the alert to observe what course the other driver might be taking, he proceeded to cross the intersection and to commence a left-hand turn against the cross-traffic, without even looking again, to see whether Carter was slowing down, or was otherwise adopting a course which would prevent a collision. The second time Anderson looked, his car was near the centre of the intersection and

Carter's car was only 6 or 8 feet away from him. A collision had become inevitable. In my opinion, Anderson, in this regard, shewed an utter want of that reasonable care which the law requires of every driver of a motor-vehicle upon the highway, even though he enjoys, for the moment, the statutory right of way. Furthermore, as the facts are disclosed by Anderson's own statements on discovery, his conduct, after he saw that a collision was unavoidable, was negligent in a marked degree. Carter's car was 6 or 8 feet away from him. The impact followed; Anderson's car was turned slightly to the right, and it travelled 45 feet to and along the edge of the sidewalk until it struck the hydrant, and struck it with such force that the girl's leg was crushed and mangled, and the iron hydrant was broken off the watermain, so that the water gushed out over the street; and up to that point Anderson had not even put on his brakes, or attempted to do so. Each car, at the time of the collision, was going at a moderate rate of speed, 10 or 12 miles an hour. Anderson does not even say that he shut off the gas. When he got over the edge of the kerb, he tried to swing back on to the pavement, but why did he make no effort to stop, or even slow down? Had he done so, it is reasonably certain that this unfortunate girl would have escaped injury, as even a fraction of a second more would have taken her beyond the hydrant, by which the pursuing car was stopped.

With great respect, I do not think the principle invoked in the case of *Jones v. Boyce*, 1 Stark. 493, is applicable to the facts of the case at bar. In the *Jones* case, the plaintiff, a passenger on a coach, fearing that the vehicle was about to capsize, owing to the breaking of a defective coupling, jumped from the coach and sustained a broken leg. The coach did not capsize, but Lord Ellenborough (p. 495) instructed the jury that:—

"To enable the plaintiff to sustain the action, it is not necessary that he should have been thrown off the coach; it is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap or to remain at certain peril; if that position was occasioned by the default of the defendant, the action may be supported. . . . The question is, whether he was placed in such a situation as to render what he did a prudent precaution, for the purpose of self-preservation."

That the principle applies only in cases in which there is an "alternative personal danger" is clearly affirmed by Lord Sumner in *S.S. Singleton Abbey v. S.S. Paludina*, [1927] A.C. 16, at the top of p. 29.

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If, in the case at bar, Anderson, just before or at the time of the collision, on the impulse of the moment, when actuated by fear of imminent personal injury, due to Carter's negligence, had adopted some alternative by which he, Anderson, sustained injury, then the *Jones v. Boyce* principle would be applicable. But that was not the position. After the impact, when, so far as the evidence discloses, Anderson was in no personal danger, and his obvious duty was to stop his car as quickly as he could, he neither shuts off the gas nor applies the brakes, but goes careering on, to and along the edge of the sidewalk, for a total distance of 45 feet (according to his own measurement) until the car is brought to a stop by the hydrant. Neither was it a case of causing injury to a third person (the infant plaintiff) when, being suddenly confronted with an emergency fraught with peril to himself, he swerves in an effort to avoid injury, and instantly, as a result of such swerving, such third person is injured. In the case before us, the emergency had passed, Anderson had escaped injury, and, as I view the matter, his urgent duty, on a busy street-corner, when his car was heading for the sidewalk, was to bring it to a stop at the earliest possible moment.

According to his own statement on discovery, he did nothing to that end. It is a matter of almost common knowledge that he could have stopped his car altogether (when running at 10-12 miles an hour) in much less than 45 feet. But I do not rely on that; my view is that he should have made some effort to stop it, and he made none. I think that was negligence for which he is responsible to the plaintiffs.

Upon the question of the quantum of damages the evidence discloses that the female plaintiff was a student at the Central Technical School in the city of Toronto, taking the course necessary to enable her to qualify as a dietitian. Evidence was given by Miss Pattinson, Director of the Household Science Department in the Technical School. She stated that Miss VanCamp was a very good student, that she had already put in one year and two months of the two-year course at that school, that there had been a previous preparatory course of three years in a high school, that, after completion of the course in the Technical School, she would require to spend from 3 to 6 months in training in an institution under a trained dietitian, with a view to institutional work, and that she would then be qualified to undertake work of that character. This witness stated further that the lowest salary paid to a dietitian was \$60 a month,



together with her living expenses, and that the salary goes up to as high as \$150 a month in some positions, and sometimes even considerably beyond that sum, but that those who would get \$150 or more would probably be university graduates. The salary in each case would also carry living expenses.

The infant plaintiff is about 18 years of age, had always been well and strong, had been able to play all sorts of games and take part in all the usual out-door sports and pleasures in which a healthy, strong girl might participate, and, from the evidence, she had thoroughly enjoyed doing so. The defendant Anderson's car crushed her against the iron hydrant in such a manner and with such force that her leg was terribly mangled and had to be amputated above the knee. According to the evidence of Miss Pattinson, this would very largely unfit her for the work and occupation of a dietitian. Judging from remarks made by the learned trial Judge, in the course of the trial, it is manifest that, to express it mildly, he did not entertain any very exalted opinion of dietitians and their occupation.

If one has in mind the circumstances of the case, the nature of the injury sustained by a girl of 18, and the effect which it was, according to the evidence, bound to have upon her life and prospects, the following excerpt from the language used by the learned trial Judge in his reasons for judgment will speak for itself, and does not require comment.

[The learned Justice of Appeal then quoted from the judgment of the trial Judge, *supra*, three paragraphs dealing with the question of damages.]

Evidence was given by a physician, Dr. Harris, to the effect that the girl was 60 per cent. incapacitated. As a dietitian, upon the evidence, \$1,500 a year, including salary and living expenses, would not have been an unreasonable sum to be anticipated as within her earning power. On an annuity basis, allowing for even 50 per cent. of incapacity, she ought to have received in the neighbourhood of \$12,000. In addition to the question of the impairment of her efficiency, there are the other factors which should have great weight in the scale, namely, the terrible injury sustained, the suffering undergone, the probable effect on her prospects of marriage, and other elements which are proper to be taken into consideration in estimating damages. With all due respect for the learned trial Judge, I think it must be manifest, from the language used by him, that several important factors relative to the question of the quantum of damages were either not considered at all as not

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being of such nature as entitled them to be considered, or, if considered, were treated as being of very light weight and little importance.

After careful consideration, I have come to the conclusion that the damages to be awarded to the female plaintiff should be at least \$10,000, and I would increase the damages to that sum.

If any precedent is required for the increase by an appellate court of the amount of damages allowed by the trial Judge, reference may be had to the case of *Clinton v. County of Hastings* (1923), 53 O.L.R. 266, in which case the damages, fixed at \$4,000 by the trial Judge, were increased by the appellate court to the sum of \$10,000. The female plaintiff in the *Clinton* case was, by her injuries, debarred from pursuing the career of a professional musician, and the Appellate Division held that damages for the loss of the physical ability to follow her chosen profession were not too remote. This decision, including the increase of the damages awarded, was affirmed by the Supreme Court of Canada: *County of Hastings v. Clinton*, [1924] 2 D.L.R. 217, [1924] S.C.R. 195.

If the action as against Anderson is to be dismissed as a result of the judgment of this Court, then, as it is abundantly manifest that the plaintiffs could not tell which of the defendants was at fault, and therefore liable for the injuries sustained, upon the authority of *Bullock v. London General Omnibus Co.*, [1907] 1 K.B. 264, and *Besterman v. British Motor Cab Co. Ltd.*, [1914] 3 K.B. 181, at pp. 186-7, both decisions of the Court of Appeal, which have been followed in various cases in this Province, the plaintiffs should be given the costs which they are required to pay to the successful defendant, as against the defendant who was found liable to the plaintiffs for damages.

One of the potent factors in determining whether or not it was reasonable for the plaintiffs to sue both of them, because it was very difficult, if not impossible, for her to know which was responsible for the collision, is the fact that each of the defendants blamed the other and sought to put the responsibility upon him. In the case at bar, in addition to the above factor, there is also, bearing upon this point, the fact that the trial Judge was of opinion that Anderson was at fault to a greater degree than was Carter. It would, therefore, seem to me to be pre-eminently a case in which the rule as to the allowance of costs, as above mentioned, should be applied in the plaintiffs' favour.

*Judgment as stated by* MULOCK, C.J.O.

## [APPELLATE DIVISION.]

REX V. BAKER.

1928,

Nov. 19.

*Criminal Law—Conviction for Negligent Breach of Duty Causing Grievous Bodily Injury—Hoistman in Mine—Momentary Forgetfulness—Absence of Gross Negligence or Wanton Misconduct—Criminal Code, secs. 247, 284.*

The defendant was convicted for that, while acting as hoistman in a mine, he, by doing negligently or omitting to do an act which it was his duty to do, did cause grievous bodily injury to the person of N. P., contrary to sec. 284 of the Criminal Code:—

*Held*, upon appeal from the conviction, having regard to the provisions of sec. 247 as well as 284 of the Code, that it was the duty of the appellate court to inquire and determine whether or not there was on the part of the defendant that negligence, going beyond a matter of compensation between subjects, which shewed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.

Review of the authorities.

*Rex v. Bateman* (1925), 19 Cr. App. R. 8, specially referred to.

And *held*, that, the injury to N. P. being, upon the evidence, the result of a momentary lapse or forgetfulness on the part of a man (the defendant) who was making an honest effort to discharge his duty, and who had been for 20 years engaged as a hoistman without a single black mark against him and was spoken of by his superiors as a thoroughly conscientious workman, the conviction should be quashed.

AN appeal by the defendant from his conviction by the Police Magistrate for the District of Sudbury of an offence against sec. 284 of the Criminal Code.

October 31. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

*J. J. O'Connor*, for the appellant.

*W. B. Common*, for the Crown.

November 19. The judgment of the majority of the Court was (by direction of the Chief Justice) read by GRANT, J.A.:—An appeal from a conviction made on the 15th October, 1928, at Sudbury, by the Police Magistrate for the district, for that the accused, "at the town of Frood, in the district of Sudbury, on or about the 23rd day of September, A.D. 1928, while acting as hoistman in the mine of the International Nickel Company, by doing negligently or omitting to do an act which it was his duty to do, did cause grievous bodily injury to the person of Nestor Peltola, contrary to section 284 of the Criminal Code of Canada."



App. Div. The accused elected summary trial, pleaded not guilty, was tried  
1928. by the magistrate and convicted, and sentenced to pay a fine of  
\$200 and costs, or, in default of payment, to suffer three months'  
REX imprisonment. From this conviction the accused appeals, the  
v. principal ground being that the conviction was not supported by  
BAKER. the evidence.

Grant, J.A.

Section 284 of the Criminal Code reads as follows:—

“Every one is guilty of an indictable offence and liable to two years’ imprisonment who, by any unlawful act, or by doing negligently or omitting to do any act which it is his duty to do, causes grievous bodily injury to any other person.”

With sec. 284, as throwing light upon the question under consideration, should be read sec. 247, which, as the heading indicates, has to do with the “duty of persons in charge of dangerous things.” Section 247 reads as follows:—

“Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty.”

As already appears, the accused was employed by the International Nickel Company, at their mine at Frood, as hoistman. His duty was to control and manipulate certain levers or switches by which the skips or cages were raised and lowered in the mine-shaft, which was stated to be some 1,200 feet deep. In this shaft there were two skips, which worked in a sort of counterbalance, one skip rising in the shaft while the other was being lowered. Other employees of the company were working at the bottom of the shaft, and the accused was required so to control the movement of the skips that the one descending would be stopped at a point approximately 20 feet above the bottom of the shaft. When the descending skip is thus stopped, the hoistman should not allow it to proceed to the bottom until he receives a signal, by the ringing of two bells, to indicate that everything is clear and that the skip may be allowed to descend to the bottom.

In front of the hoistman as he stands at his levers there is required to be, and was in this case, a dial, the hand or hands of which would indicate from time to time the position of the skips in the shaft. In addition to the dial, however, there is also re-



quired to be, under the mining regulations, what is called a buzzer, which will ring or sound for the warning of the hoistman, when the descending skip is at a point about 100 feet from the bottom of the shaft. On the occasion in question the dial was working, but the buzzer was out of order and was not working, and the accused did not have the benefit of the warning which the buzzer would have given him, as was required under the mining regulations.

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In the same room where the hoistman was standing at his duty, somewhat to his rear and to the right hand, were located certain clapperboards (so-called), which Smith, the chief electrician, described as magnetic contactors, consisting of an electric magnet which, he states, controls the contact and is used to accelerate or decrease the speed of the motor. He states further that they work automatically but under the control of the hoistman, who has nothing to do with the repair or keeping in order of these clappers; he is supposed to report if they should go wrong. This same witness states that it was afterwards found that the buzzer was not working and that the electrician who was in charge was discharged.

The accused gave evidence on his own behalf, and I think it is but fair to him to state that he appears to have given his evidence very frankly and honestly, and in a manly, straightforward manner. His statement describing how the accident occurred is quite brief and may be given in his own language:—

“We were hoisting muck from the bottom of No. 1 shaft. I got one bell to pull up No. 2 skip, and I put on my controller, and when she got up a little piece I heard a noise behind me and I looked around and one of the clappers was flying in and out, and I did not notice which one it was the last time. I must have been probably about 150 feet from the surface” (this doubtless refers to the ascending skip “when I looked around to see if I could locate it. I did not locate it, and when I looked back the skip was possibly 12 to 15 feet from the dump (the bottom of the shaft). I pulled off my control and put on my brake, but I could not stop it.”

He explains further that they had been having trouble with these clappers from time to time, and, although repairs had been made, yet the trouble recurred. As the clapperboard regulated the speed of the hoist which it was his duty to control, he wanted to see what clapper was out of order so as to be able to report to the electrician and have it put right.

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In regard to the noise made by the clapper he states, "When the noise is normal we do not pay any attention to it, but when it gives you trouble it is quite a report and flash and it is pretty hard not to look around." Also, when asked the question, "You could not stop the hoist and leave the electricity on to see which one it was?" his answer was, "No, it is liable to burn out the motor."

The deceased Peltola was working in the bottom of the shaft, and was so crushed by the heavy descending skip that he died shortly afterwards as a result of his injuries so received.

In view of the state of the law bearing upon the question here involved, it is necessary carefully to consider the evidence bearing upon the incidents which are put forward by the accused in explanation of or excuse for his momentary lapse from the proper discharge of his duty.

One Sinclair, mining inspector for the district, was called on behalf of the Crown and gave a brief outline (summarised above) of the practice in the handling of a mining hoist under the Mining Act and regulations. On cross-examination he gave evidence as to the noise made by the clappers, and also as to the necessity for the buzzer, and its purpose, namely, to warn the hoistman for the protection of the workmen in the shaft:—

"Q. Do you know these clappers that they have in the hoist-room? A. I have seen them.

"Q. Have you ever seen them working? A. Yes, and heard them.

"Q. They make quite a noise? A. Yes.

"Q. Enough to attract the attention of any man? A. Well, he would have to have himself pretty well steeled against it.

"Q. And the only natural thing to expect a man to do would be to look at them? A. Yes, I think so.

"Q. And if these clappers were going in and out and the hoistman looked back to see, the natural thing for him to do would be to look and see which one was causing the trouble? A. Yes, of course there is a common noise to them all the time.

"Q. In any event, you have seen them work, and, as you state, you would have to be pretty well steeled against it? A. Yes, a man would have to be steeled against it.

"Q. And if they were acting very bad he would have to be pretty good to resist the temptation to look and see which one was causing the disturbance? A. Yes.

"Q. Now there is a buzzer? A. Yes.

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"Q. Is there any regulation about that? A. It should be set to give the hoistman warning when he is approaching the surface.

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"Q. Is there any regulation under the Mining Act which compels them to have a buzzer on that? A. Yes, in shafts over 600 feet.

"Q. And it isn't the duty of the hoistman to see that that buzzer is working? A. It is for his own protection that it is there.

"Q. It is up to the electricians to do the repair-work on it? A. Yes.

"Q. And that buzzer rings just before the skip approaches the bottom? A. No, about 100 feet from the bottom.

"Q. It is really for the one approaching the top? A. It is on the side of the ascending skip.

"Q. That would shew that if one is coming to the top the other is going to the bottom? A. Yes.

"Q. And the reason he stops that skip is for the protection of the men at the bottom of the shaft? A. Yes."

David Cross, deckman in the employ of the Nickel Company, was also called for the Crown and gave some evidence regarding the clappers and the noise which they make:—

"Q. You have heard those clappers going? A. Yes.

"Q. They make a lot of noise? A. Yes.

"Q. They have been having trouble with them out there? A. Yes.

"Q. In fact yesterday, I understand, they had trouble with them out there? A. Yes.

"Q. Now isn't it a natural thing when these start making a lot of noise for a man to turn around to see which one it is? A. Yes, if they were making an extra amount of noise.

"Q. You went in there one time to find out what the trouble was? A. Yes.

"Q. And you made the statement that it sounded like a half a dozen machine-guns? A. Yes.

"Q. Do you know how they were the day of the accident? A. They seemed to be normal as far as I know.

"Q. Had you any trouble with them before that? A. Yes.

"Q. Had they been able to locate the trouble? A. Apparently they located it and fixed it and it went wrong again.

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"Q. And they were not sure which one it was? A. No.

"Q. And if they went wrong it would be natural for a man to look and see which one was causing the trouble? A. Yes."

Smith, the electrician, who was also called as a Crown witness, in his evidence in chief was asked the question, "Then what do you say about the hoistman's duty so far as bringing up and down the skips are concerned, has he any right to be disturbed by anything going wrong with these clappers or anything like that? A. No, although when the clappers do go wrong they do throw a very bad flash." On cross-examination he was asked as to the buzzer and gave the following evidence:—

"Q. The buzzer was disconnected by the electrician? A. Yes.

"Q. And the buzzer was on there to indicate to him the position of the hoist? A. Yes.

"Q. And if the buzzer had been on that day, even if his attention had been distracted, he had plenty of time to stop before the skip got to the bottom? A. I should think so."

The accused in his testimony, when asked as to the speed with which the skip runs, stated that it was at the rate of 10 to 12 miles an hour and that the ascending skip would come up to the 1,200 feet in two minutes or a little more. The accused stated that he had been engaged in the occupation of hoistman for about 20 years, and in all that time had never previously had an accident.

Smith, the electrician, states of the accused, "I have always found him a most conscientious man," and again in his evidence the following questions and answers appear:—

"Q. You have known Baker for five years? A. Yes.

"Q. And, as far as you know, you have always found him to be a conscientious man as a hoistman? A. Absolutely.

"Q. Never any trouble with him before? A. No."

No written reasons were given by the magistrate; but, as there does not appear to have been any material conflict of testimony, the absence of any statement of the reasons for the conviction is not so important.

On behalf of the Crown it was contended that the effect of sec. 247 is to create an absolute duty devolving upon the person in charge of (in this case) the hoist, the operation of which was attended with danger to others, to avoid at his peril anything in the nature of want of care; in other words, that the want of care which might give rise to a civil action for damages would, in such a case, also involve criminal liability under the section.



For this proposition counsel cited *McCarthy v. The King* (1921), 62 Can. S.C.R. 40.

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In *Rex v. Greisman* (1926), 59 O.L.R. 156, at p. 162, Middleton, J.A., delivering the judgment of the Court, states: "Mr. Justice Idington in this case" (*McCarthy v. The King*) "expressed the opinion that this statute made one criminally liable who is guilty of such negligence as would render him liable in a civil action for damages. In this he stands alone—none of the other members of the Court expressed the same opinion."

In *Union Colliery Co. v. The Queen* (1900), 31 Can. S.C.R. 81, at p. 87, Sedgewick, J., delivering the judgment of the majority of the Court, after quoting sec. 213 of the Code, which was, substantially, the same as the present sec. 247, uses these words: "This article I take to be a mere statutory statement of the common law, neither abridging nor enlarging it in any respect." In the *McCarthy* case (*supra*) Duff, J., at the foot of p. 43, expresses his agreement with the above opinion expressed by Sedgewick, J.

Since the *McCarthy* case the Court of Criminal Appeal in England has given judgment in *Rex v. Bateman* (1925), 19 Cr. App. R. 8, where the authorities are reviewed at considerable length, and the Lord Chief Justice states (at the foot of p. 11) that "in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and shewed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment." The same language is repeated at p. 13.

In dealing with the summing-up or charge to the jury given in the *Bateman* case, at p. 16, the learned Lord Chief Justice states: "If the words 'gross,' 'wicked,' and 'culpable' are put aside, this summing-up amounts to a direction to the jury that they must draw the line between mistake or error of judgment on the one hand, and carelessness or incompetence on the other hand. If there was only mistake or error of judgment there is no liability, but if there was any falling short of a fair average degree of care or competence, then there is liability. Such a direction would be complete or accurate on the trial of an action for damages for negligence. It is not adequate on the trial of an indictment for manslaughter."

Further, at the foot of p. 16, he uses the following language: "It is desirable that, so far as possible, the explanation of criminal

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negligence to a jury should not be a mere question of epithets. It is, in a sense, a question of degree, and it is for the jury to draw the line, but there is a difference in kind between the negligence which gives a right to compensation and the negligence which is a crime."

In the *Greisman* case (*supra*) the authorities were reviewed and a number of excerpts from the *Bateman* judgment are given. At the middle of p. 162 of 59 O.L.R. the result is summarised as follows: "I think the great weight of authority goes to shew that there will be no criminal liability unless there is gross negligence or wanton misconduct. To constitute crime there must be a certain moral quality carried into the act before it becomes culpable. In each case it is a question of fact, and it is the duty of the Court to ascertain if there was such wanton and reckless negligence as in the eye of the law merits punishment. This may be found where a general intention to disregard the law is shewn, or a reckless disregard of the rights of others."

This statement of the law is approved by the same Divisional Court in *Rex v. Cooper* (1927), 33 O.W.N. 97, at the foot of p. 98.

In Roscoe's Criminal Evidence, 15th ed., p. 918, Blackburn, J., is quoted as follows:—

"Negligence is a phrase constantly used in criminal cases, but the amount of negligence that would make a man so responsible cannot be defined. It is not a little failure of duty that would make him criminally responsible; a great failure of duty undoubtedly would. The line between the two is hard to define and must be left to a very great extent in each individual case to the common sense of the jury."

In a foot-note to the report of *Regina v. Noakes* (1866), 4 F. & F. 920, 922, the statement is made, in explanation of the decision of Lord Chief Justice Erle, that "the real ground of the opinion was, that even a culpable mistake, and some degree of *culpable* negligence, is not *felonious*, unless it be so gross as to be reckless."

In applying these legal principles to the facts of the case under appeal, it must be borne in mind that statutory provisions and regulations, having as their object the preservation of the lives of mine-workers, and their protection from injury, ought not to be given a merely restricted interpretation. On the other hand, the Courts would not be justified in designating as a criminal offence that which is not made such by law. The law, as it stands, must serve as the basis upon which, in the particular state

of facts, the conviction or acquittal of an accused person shall rest.

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It is therefore incumbent upon this Court to inquire and determine whether or not, in the case at bar, there was on the part of the accused that negligence, going beyond a matter of compensation as between subjects, which "shewed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment." After a careful perusal of the evidence, and consideration of the law, and not being unmindful of the duty devolving upon the Court to avoid any whittling away of a salutary law designed for the protection of the public against injury from "dangerous things" in the hands or under the control of others, I have come to the conclusion that this conviction ought not to stand. Whether the negligence in any case is of such a character as to justify conviction upon a criminal charge must depend upon the particular facts of the case itself. In order to found a criminal charge, there must be present such a degree of want of care as to involve a moral element; such a wanton or reckless indifference to the lives and safety of others as would lead one to say "the State should punish that man." (*Vide* the *Bateman* case, 19 Cr. App. R. at p. 11, and the *Greisman* case, 59 O.L.R. at p. 162, third paragraph of page.)

In the case before us, the accused, standing at his levers, hears a sharp noise behind him, caused by the clappers being out of order, those parts of the electrical machinery connected with the operation of the hoist which had to do with the speed of the motor; he looks around to see, if possible, which clapper was out of order, so that he may report it to the electrician; one skip is descending in the shaft; the buzzer, by the ringing of which he should be warned when the skip reaches the 100 ft. mark, being out of order, he receives no warning; he continues looking back for a few seconds too long, as, when he looks forward again, the skip has dropped to a point only 15 ft. or 18 ft. from the bottom, and his efforts to stop its descent are made too late. It seems to me that there is not to be found here, in the momentary lapse from duty, the moral element above mentioned; that it cannot be said that there was present, or was manifested by the accused, "such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment;" and clearly that his conduct did not amount to "gross negligence or wanton misconduct." I am convinced that there was here a momentary lapse or forgetfulness, by a man who was making an

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1928. I am, in some degree, assisted in reaching such a conclusion by  
the facts that the accused had been engaged for 20 years as a  
hoistman without a single black mark against him, and that he  
was spoken of, by his superiors, as a thoroughly conscientious  
workman. My conclusion, therefore, upon the special facts of  
this case is that the appeal should be allowed and the conviction  
set aside.

*Appeal allowed.*



[KELLY, J.]

## RYCKMAN V. TRUSTS AND GUARANTEE CO. LTD.

1928.

Nov. 24.

*Landlord and Tenant—Lease to two Tenants—Death of one and Bankruptcy of the other—One Executor of Deceased Tenant Taking Possession of Demised Premises—Liability as Assign of Term—Actual Rental Value of Premises—Claim by Landlord for Rent, Taxes, and Repairs against Executors both in Personal and Representative Capacities—Election—Breach of Covenant to Repair—Removal of Part of Building—Claim against Trustee in Bankruptcy—Leave to Prosecute Claim not Obtained in Bankruptcy Proceedings—Bankruptcy Amendment Act, 1923, 13 & 14 Geo. V. ch. 31, sec. 30.*

In March, 1921, the plaintiff executed a lease of land and buildings to H. and M., covenanting to allow the lessees to erect a partition on the ground floor of the chief building and himself to contribute \$1,000 towards the cost. The partition was built, the plaintiff contributed the \$1,000, and the lessees went into possession. H. died in January, 1923, and his wife, the defendant A. E. H., and the defendant company, the executors named in his will, obtained probate thereof. In October, 1923, M. made an assignment in bankruptcy, and the defendant company was appointed custodian of the bankrupt estate. The plaintiff's claim in this action was to recover a large sum made up of rent, taxes, cost of repairs, and interest. He alleged that the defendants entered into and from the month of January, 1923, continued in possession and receipt of the rents and profits of the demised premises, and claimed payment from them personally, as well as out of the assets of the estates of H., deceased, and M., in bankruptcy. At the trial the plaintiff was allowed to amend by adding a claim for damages for removal of the partition, which had disappeared:—

*Held*, upon the evidence, that the defendant company entered upon the premises not merely in its representative capacity as executor, but personally as assign of the term, and as personally chargeable with the amount of rents and profits which it received and with such further sums as it might have received if it had used due diligence, but not exceeding in the aggregate the full amount of the actual rental value of the premises; but the other executor, the widow, did not personally enter at any time after her husband's death, nor was her co-defendant her agent or representative in that respect, and she was not personally liable for the consequences of the entry.

Review of the authorities.

*Held*, also, that the plaintiff could not proceed upon the two claims, viz., that against the executors in their representative capacity and that against them personally, but must elect to proceed upon one or the other.

*Held*, also, that the plaintiff's claim in respect of the partition should be allowed at the amount which he contributed towards its erection, less a reasonable sum for depreciation.

The claim against the defendant company as trustee in bankruptcy of M.'s estate was not properly before the Court in this action, no leave to commence or prosecute an action upon such claim having been obtained in the bankruptcy proceedings: see the Bankruptcy Amendment Act, 1923, 13 & 14 Geo. V. ch. 31, sec. 30.

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AN action against the executors of the will of Aubrey O. Hurst, deceased, and the trustee in bankruptcy of the property of Joseph Wesley Mullen, to recover \$15,422.62, made up of the rent of premises in Yonge-street, Toronto, from the 1st October, 1923, to the 1st March, 1926, taxes paid by the plaintiff, and the cost of some repairs, with interest, less certain payments received and credited by him.

The action was tried before KELLY, J., without a jury, at a Toronto sittings.

*Shirley Denison*, K.C., for the plaintiff.

*The Hon. N. W. Rowell*, K.C., and *J. B. Allen*, for the defendants.

November 24. KELLY, J.:—On the 29th March, 1921, the plaintiff made a lease, in pursuance of the Short Forms of Leases Act, of his property, street Nos. 740 and 742 on the west side of Yonge-street, in Toronto, for a term of five years from the 1st May, 1921, to A. O. Hurst and Joseph Wesley Mullen, at the yearly rental of \$6,000, payable in equal monthly payments of \$500 each in advance, the lessees to pay all taxes, water-rates, gas and electric light rates, and local improvement rates and assessments. The property has a frontage of about 33 feet 7¾ inches on Yonge-street by a depth of about 282 feet 3 inches, to Balmuto-street.

On the part of the property fronting on Yonge-street is a building two storeys in height with a rear extension, and there were other less important structures towards the Balmuto-street frontage. In the lease the plaintiff covenanted to allow the lessees to erect a partition on the ground floor of the premises and to make other alterations deemed necessary by the lessees, all in a manner to be approved by the lessor, and to contribute a sum not exceeding \$1,000 towards the cost of the partition, the lessees covenanting to pay during the term of the lease, in equal monthly instalments (on each gale-day), an additional rental equal to interest at 10 per cent. per annum on the sum or sums so paid by the lessor. The partition was built, the plaintiff contributing \$1,000 to its cost; and the lessees went into possession.

Hurst died in January, 1923, and his wife, the defendant Annie Ellen Hurst, and the defendant company, the executors named in his will, obtained probate thereof.

In October, 1923, Mullen made an assignment in bankruptcy, and on the 30th of that month the defendant company was ap-

pointed custodian of the bankrupt estate. On the 20th November, 1923, Mullen's stock-in-trade and fixtures were sold by the custodian, and the defendant company rented that part of the premises to the purchaser—evidently to accommodate him for the time being—until the 30th November, 1923, for a consideration of \$50, which was paid by cheque in favour of the defendant company as executor of A. O. Hurst.

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The plaintiff's claim is to recover \$15,422.62, made up of rent from the 1st October, 1923, to the 1st March, 1926, taxes paid by him, and the cost of some repairs, with interest, less certain payments received by him and credited to his account. The endorsement on the writ of summons (there is no other statement of claim) claims payment by the defendants of the above mentioned sum, "being rent, taxes, repairs, and interest due under the covenants" in the lease, etc., and sets forth that "the defendants entered into and continued in possession and receipt of the rents and profits of the demised premises since the month of January, 1923, and the plaintiff claims payment from them personally as well as out of the assets of the estates of Aubrey O. Hurst, deceased, and Joseph Wesley Mullen, in bankruptcy."

This is an outstanding instance of the unsatisfactory practice of going down to trial on a record made up merely of the endorsement on the writ of summons and an affidavit of merits, a practice which it is earnestly desired will soon be at an end or modified. A proper record made up on proper pleadings should not have been dispensed with. Many of the difficulties which arose in the trial would have been avoided if the regular mode of proceeding had been followed.

Upon the opening of the trial, the plaintiff moved on notice for leave to amend by adding a claim for damages for breach of covenant to repair, "on the ground that certain partitions which were in the building at the time the defendants entered into possession have been removed and have disappeared, and on the ground that the rental value may be depreciated owing to the fact that the demised premises no longer constitute two separate buildings, whereby the rental value of the premises has been lessened." Decision on the application was then for the time being reserved. I think, however, that the amendment should be allowed, and I now so direct, the evidence in respect of it having been fully gone into.

The manner in which the plaintiff's claim is laid against the defendants was the subject of objection on their behalf at the opening of and during the trial; their counsel contended that the



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plaintiff should elect to proceed either against the defendant company and Mrs. Hurst as executors representing the Hurst estate or against them in their personal capacity, submitting that they could not be properly sued in both capacities in respect of the same rent; and, moreover, that the form of the claim left in doubt the question of its extent as against the trustee in bankruptcy of the Mullen estate. There was no trustee in bankruptcy of the Mullen estate until October, 1923. It is apparent, therefore, that the claim as against that defendant is inaptly laid in so far as it alleges that the trustee in bankruptcy entered into possession in January, 1923.

The reluctance on the plaintiff's behalf to state or suggest whether he regarded the claim as against the defendant company and Mrs. Hurst as personal or as merely representing the estate, left it open to the suggestion that he was uncertain of his position—that is, uncertain as to who, if any one, is indebted to him. If that were really the case, it may have been due to lack of knowledge of the real facts.

As I understand the position taken by the plaintiff's counsel, having laid the claim in the form in which it appears, he has left it to the Court to decide, upon the evidence, whether the claim is maintainable, and if so whether against all the defendants in their several and respective capacities or only against some, and if the latter, then against which of them. The position taken by the defendants in answer to the claim as set forth in the affidavit of merits made by Mr. Whitehead, the estates manager of the defendant company, is that the company and Mrs. Hurst, only as executors of A. O. Hurst and in no other capacity personally or otherwise, admit owing to the plaintiff \$15,244.73, instead of \$15,422.62 claimed by the writ of summons, the difference being made up of a payment of \$139.60 paid to, but inadvertently not credited by, the plaintiff, and (\$12.96) interest thereon, and a sum of \$25.33 representing interest for six months on \$1,000 paid to the plaintiff on the 26th May, 1924, but not credited until the 26th November of that year; that the trustee in bankruptcy of the Mullen estate realised upon and duly distributed the proceeds of the assets of that estate and is no longer liable to the plaintiff; and that from the 30th November, 1923, the company and Annie Ellen Hurst, as executor and executrix, and in no other capacity, made endeavour to realise something out of the leasehold property, and from time to time from the 12th January, 1924, sublet the same to various persons, and accounted for the returns so received; and further that the trustee in bankruptcy of Mullen



realised and duly distributed the proceeds of all of the assets of that estate, and as trustee in bankruptcy is no longer liable to the plaintiff. The proceeds of the sale of the assets of Mullen's bankrupt estate went to the plaintiff on account of his preferred claim for rent; and from the time of such sale the defendant company seems to have regarded that estate as no longer interested in the transaction or a factor in what followed in relation to the letting and occupying of the premises.

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The important question whether they acted in their representative capacity as executors merely or personally as assignees of the term was a subject of much argument. If the former, the claim for rent accruing subsequent to the death of the testator is properly against the assets of the testator's estate; if the latter, and assuming that they entered into possession in the legal sense, they are personally chargeable with the amount of rent and profits they have received and with such further sums as they might have received if they had used due diligence, but not exceeding in the aggregate the full amount of the rental value of the premises.

From the beginning of 1924 until the end of the term of the lease the defendant company dealt with this leasehold property, letting the premises from time to time successively to several tenants, collecting and receiving rents from these occupants, making some repairs, etc., and generally so acting in respect of the property as to leave no doubt of its having taken and held possession during that time. I do not, however, find in the evidence anything to indicate that Mrs. Hurst, one of the executors, personally entered into possession at any time after her husband's death or to support the proposition that the company's entry was on her behalf as well as its own, or that it was her agent or representative in that respect; and I am therefore of opinion that she is not personally liable for the consequences of the entry. This, of course, is apart from whatever liability may be hers in the capacity of one of the executors of her husband.

It is convenient here to refer to the claim against the trustee in bankruptcy. That claim is not properly before the Court in the present action. A considerable time before the action was commenced, the defendant company had become custodian and trustee of the Mullen estate in bankruptcy, and as such proceeded to realise upon the assets and distribute the proceeds thereof, thus becoming subject to the terms of the Bankruptcy Act as then in force. See the Bankruptcy Amendment Act, 1923, 13 & 14 Geo. V. ch. 31, sec. 30, providing that, on the making of a receiving order

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or authorised assignment, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor, or shall commence or continue any action, execution, or other proceeding for the recovery of the debt provable in bankruptcy unless with the leave of the Court and on such terms as the Court may impose, etc. There is no evidence that these requirements have been observed. It is unnecessary, therefore, to consider here whether the company's possession of the property was also in its capacity as representing the Mullen estate in bankruptcy, such claim not being maintainable in this action. It may, however, be mentioned incidentally that there is very positive evidence that the trustee in bankruptcy realised upon the assets of the bankrupt, except certain claims for rent against sublessees of the bankrupt, namely, the Pentanguishene Carriage Company and Weisbrod; and it is very questionable if anything could have been realised upon these two claims, my own opinion being that it would most likely have been useless to incur expense in a further endeavour by the trustee to collect these claims.

For the same reasons it is to no purpose to consider in this action the claim that the trustee has retained out of the assets a sum to meet the costs of obtaining a discharge—for which there is no fee unless the application therefor is contested. Moreover the trustee has not so far applied for a discharge, and it is not known whether if application be made it will be contested. All this, however, is a matter to be considered in the bankruptcy proceedings and not here.

My conclusion being that the defendant company entered into possession in the manner, at the time, and in the capacity already declared, that its co-representative, Mrs. Hurst, did not so enter into possession, and that the claim against the trustee in bankruptcy of Mullen's estate is not here cognizable, no leave to commence or prosecute an action upon such claim having been obtained, the case narrows down to two important considerations: first, as to the liability of the executors of one of the original lessees, Hurst, in their representative capacity upon the lessee's covenants in the lease; and, secondly, the liability of the defendant company arising from its having entered into and obtained possession, as already mentioned.

Numerous reported decisions and statements of text-writers deal with the question thus raised, reference to some only of which will suffice. The decisions, while not in conflict with each other, are not all expressed in the same language.

The personal representative of an original lessee is liable in his representative capacity, to the extent of assets, upon the covenants contained in the lease for the residue of the term, whether the term was assigned by the lessee in his lifetime or by his representative after his death: Halsbury's Laws of England, vol. 14, p. 306, para. 713. The personal liability of such a representative is limited to the profits or yearly value of the property; it is not confined to the actual profits he may have received, but extends to the profits which he might have received if he had used due diligence: *ib.*, para. 714.

The question was discussed at length in the reasons for judgment in *In re Bowes, Earl of Strathmore v. Vane* (1887), 37 Ch. D. 128, the facts of which were very similar to those of the present case. The head-note thus summarises the decision:—

“An executor who takes possession of a leasehold of his testator is liable personally as assign of the lease for subsequent rent, up to the letting value of the holding.”

While that is a positive declaration as to the liability of one of the several representatives of an original lessee, who has taken possession, it does not necessarily involve in such liability co-representatives; for entry by one of several representatives does not render his co-representatives liable for use and occupation: Halsbury, vol. 14, p. 306, para. 714.

In the *Bowes* case, 37 Ch. D. at p. 134, Mr. Justice North, having referred to several reported decisions, said:—

“Those authorities clearly shew what the liability of the executor would be in the present case. He is liable for the actual value of the premises during the time in which he held the premises as assign.”

That case was followed in *Whitehead v. Palmer*, [1908] 1 K. B. 151; at p. 157, Channell, J., said: “The defendant” (the administrator of the estate of a deceased lessee) “however did enter, and he is therefore liable to some extent in respect of his occupation of the premises. The question is to what extent. The law is clearly settled that where there is a letting at a rent which is higher than the value of the premises, an executor is only liable up to the amount of the value of the premises, that is, if he pleads properly;” and at p. 158: “The later cases make it clear, I think, that an administrator is liable, not only for the rent which he has actually received, but for what he might have received if he had used due diligence, or, as it is sometimes expressed, he is liable for the yearly value which the premises might have yielded.”

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The form of pleading is indicated in the *Bowes* case, at p. 132. While the defendant's pleading in this respect is not in the exact language there indicated, the whole case from its various angles having been fully gone into in the evidence upon all the essential points raised, any amendments necessary to set up a defence in the terms of these authorities should now be permitted. I allow such amendment.

A more recent case is *Minford v. Carse*, [1912] 2 I.R. 245 (in appeal), in which the *Bowes* case and *Whitehead v. Palmer* (*supra*) are discussed. At p. 264 the Lord Chancellor (Barry), speaking of the measure of the liability of an executor in possession, says: "He receives, or should by proper care have been able to receive, the profits of the lands; and as they are primarily answerable for the rent, he is personally liable to make proper application of them by paying, in the first place, the rent due out of the lands. If these profits, in the sense I indicate, do not reach the full amount of the rent reserved, it is unquestionable that the personal liability of the executor will not be stretched beyond them, no matter what loss may fall thereby upon the lessor." At p. 275, Cherry, L.J., speaking of executors of a deceased lessee, who were found to have entered into possession of the leasehold property, says: "The legal consequences of such entry are well settled by authority. The leasehold term becomes vested in the executors, as assignees. Privity of estate is established between them and the lessor. They become personally liable to the lessor for rent, and for any breaches of covenant that occur while they remain in legal possession." From all of which it is so that the defendant company, having entered into possession, became liable for the actual value of the premises during the time which it held as such assignee, as stated in the *Bowes* case.

The next question which arises is, what was the rental value, and what is the defendant company's position in regard to liability to repair and to preserve the premises?

Voluminous evidence was introduced as to rental rates and values of properties in the vicinity, and incidentally of this property, during the time of the company's possession, and as to values during that time as compared with rental values at the time the lease was made. That evidence is too lengthy to permit of any detailed review here. As between the testimony or the opinions of expert witnesses called on behalf of the plaintiff and of such witnesses called on behalf of the defendants, I accept the evidence of the latter—first, because the statements of the former savoured of advocacy rather than as being their unbiassed opinion; and,



secondly, because the evidence of the latter was consistent with other undoubted circumstances. I find, on the whole evidence, that when the lease was made rental values and rents generally were high; that by the time the defendant company took possession these values had materially declined, and so continued during the balance of the term. Other conditions also tended to make properties in that part of Yonge-street less easily rentable, due to reasons such as the opening of Bay-street, the diversion of part of the street car traffic from Yonge-street to Bay-street, the establishment of important business places on the part of Yonge-street north of, instead of south of, Bloor-street. Another factor of importance affecting the renting of this property was that the company was unable to grant a lease extending beyond the term of the Hurst and Mullen lease, if, indeed, it was safe for it to make a lease for the balance of that term; in that respect its opportunity for renting was limited. It would not be remarkable or unusual that a prospective tenant would hesitate to accept a lease of a large and important property such as the plaintiff's at a high rate of rent unless for a substantial term.

But, while I am convinced that during the time that the company was in possession the rental value had declined as compared with 1921, when the lease was made, and that even with due diligence it was impossible to have obtained as high a rent as that called for by that lease, I am also convinced that the rental value exceeded what the company did receive from those to whom it rented. The fact that without the permission, and, indeed, without the knowledge, of the company, a party entered and for months occupied part of the premises; and again that anything so important and so much a part of the premises as the partition referred to in the evidence should altogether have disappeared and its whereabouts not accounted for; and the lack of records of important dealings of the company in regard to renting, etc.; and the company's failure to answer or its delay in answering communications respecting so important a matter as the proposal to continue Gorrie as an occupant at a very substantial rate of rental, are in themselves sufficient evidence, apart from anything else, that the company did not exercise that care and diligence in handling and administering the property which the position they occupied demanded. While I believe that the plaintiff attached too much importance to the condition in which the premises remained when at times vacant—referring to refuse which he says was not removed from the premises but left visible to passers-by—my opinion is that the company was not altogether blameless

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in that respect. A reasonably well kept and well appearing premises does much to appeal to a prospective occupant. Complaint is also made of the condition of the floor in the rear part of the premises; that, however, was largely due to its being old, though the use made of it by tenants under the company may have affected and most likely did affect that condition. It appears to me to have been a case of wear and tear for which the defendant was not responsible.

The lease contains these covenants by the lessees: "To keep the demised premises, drains, and other pipes, closets, wash-basins, and sanitary and water apparatus thereof in good repair and condition;" and "to repair (reasonable wear and tear and damage by fire, lightning, and tempest only excepted)." There is no express covenant by the lessor to repair. In so far as the lessee or the company made repairs coming within these covenants or either of them or repairs not expressly agreed by the lessor to be made by him, the amount expended therefor is not chargeable against the lessor. There is evidence of complaint about the condition of boundary fences on the rear part of the property; it is not shewn that that condition was not the result of ordinary wear and tear for which the lessees would not be liable.

As I recall the evidence, the company has charged against the amount it received from the occupants of the property for repairs \$50.32 and for advertising \$37. (If I am mistaken in the total of these expenditures, counsel may check up the amounts with me). The expenditure for these purposes should not be charged against the lessor.

The company also received from an occupant of the property \$240.05 which (inadvertently no doubt) has not been accounted for.

It is difficult to determine with accuracy the actual (rental) value of the premises during the time the company was in possession, and incidentally the amount of rent, beyond what it actually received, which it could have and should have received if it had acted diligently and without negligence both in regard to procuring tenants at a proper rental and observing whatever obligations were upon it to repair and keep the premises in condition. I have given the matter much thought, and the best conclusion I can reach is that, in addition to the said \$240.05, the company, acting diligently and with care as above, could and should have received in the time it was in possession \$2,000 in excess of what it did receive (this includes an amount which it should have received but did not receive from the theatre for the

time—June to October, I believe—that the latter was in possession without payment).

Then there is the question of liability in respect of the partition. This was a substantial structure built into and forming part of the premises in the circumstances I have already detailed. To suit the convenience and requirements of an occupant or occupants procured by the company, it was removed. When the plaintiff retook possession in 1926, remarkable as it may seem, the partition had altogether disappeared, and its whereabouts had not been discovered at the time of the trial. The company was then unable to account for its disappearance and knew nothing of it. It is accountable to the plaintiff for it, but not on the basis suggested by the defendants' counsel when he called a witness, Binnie, to speak of its value not as a part of the building but on the basis of its value as old or discarded material. The plaintiff's right was and is to have had the partition restored, or, failing that, to receive its value as a partition—a substantial part of the premises. He contributed \$1,000 to its erection when he made the lease; it may have cost more. Binnie also gave an estimate of the cost of constructing a new partition to replace that which was removed. He never saw the latter partition, but he says he saw marks which indicated its location and dimensions; and on these meagre data he undertook to say that the cost of erecting such a structure, assuming it to be of pine, would be \$380.29. I am not satisfied that, with the opportunity he had of estimating the partition which disappeared or from the manner of his evidence, his opinion could safely be accepted as against the other evidence on the subject. A fair conclusion to be drawn from all the evidence is that the plaintiff should be allowed what he contributed towards the erection of the partition, less a reasonable sum for depreciation—or a net allowance of \$800.

This brings me to the consideration of the question whether the plaintiff must elect to claim against the executors in their representative capacity, or in their personal capacity as assignees (or such of them as entered into possession). In the first place, the interest of a lessee in a demised premises vests, upon his death, in his personal representatives (Halsbury, vol. 18, p. 598, para. 1143). The liability of the lessee to the lessor continues notwithstanding that the lease has been assigned, and that the lessor has a remedy against the assignee. The lessor may sue either the lessee or the assignee, or both at the same time; but he can only have one satisfaction (Halsbury, vol. 18, p. 592, para. 1131). Two old cases are there cited—*Brett v. Cumberland* (1619), Cro. Jac. 521, and

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Kelly, J. *Bachelour v. Gage* (1630), Cro. Car. 188. (See also Halsbury, vol. 14, p. 306, para. 714). The subject is dealt with in *Minford v. Carse*, [1912] 2 I.R. at p. 275, where, referring to the liability of executors as assignees, Cherry, J., says:—

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“Their liability as assignees continues as long as the estate remains vested in them, and if the landlord elects to treat them as such he can recover judgment against them *de bonis propriis*. If, on the other hand, the landlord so elects, he may treat them as executors and recover judgment against them *de bonis testatoris*. There is a marked distinction between their position as executors and their position as assignees, which it is necessary carefully to bear in mind.” And at p. 281: “The amount of the liability must be ascertained before there can be any judgment for the plaintiff.”

My opinion is that the plaintiff is bound to elect as between the two claims above referred to. If he elect to claim against the executors in their representative capacity, he should be allowed \$15,244.73 and also the value of the partition (\$800), with interest on both sums from the issue of the writ. If he elect to claim against the defendant company personally, he should be allowed \$2,240.05, and \$800 for rebuilding the partition, and interest on both from the issue of the writ.

I am unable to direct judgment to be entered until election has been made. When that time comes, I shall also dispose of the costs.

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[WRIGHT, J.]

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JOHNSON V. GENERAL ACCIDENT ASSURANCE CO.

Nov. 27.

*Insurance (Accident)—Death of Assured by Accident—Intestacy—Action by Son, not Named as Beneficiary in Policy—Grant of Letters of Administration after Commencement of Action—Amendment by Describing Plaintiff as Administrator—Relation back to Commencement of Action—Limitation Clause of Insurance Act, R.S.O. 1927, ch. 222, sec. 187, condition 21.*

The plaintiff, the only child of J., who on the 30th September, 1926, as the result of an accident, died, intestate and a widower, commenced this action on the 26th November, 1926, upon an accident insurance policy issued by the defendants upon the life of J. The plaintiff was not named as beneficiary in the policy. On the 9th May, 1927, while the action was pending, the plaintiff obtained from a Surrogate Court letters of administration to the estate of J., and, when the action came on for trial, in 1928, applied for leave to amend the proceedings by describing himself as the administrator of the estate of J.:—



*Held*, that the amendment should be allowed and the plaintiff awarded judgment for the amount of the policy.

The letters of administration related back so as to validate the action already commenced by the plaintiff, the person first entitled to a grant of letters of administration, although he at first sued ostensibly in his individual right; and the action must be regarded as having been brought within the period allowed by condition 21, sec. 187 of the Insurance Act, R.S.O. 1927, ch. 222.

*Trice v. Robinson* (1888), 16 O.R. 433, and later Ontario cases, followed.

*Doyle v. Callow* (1849), 12 Ir. Eq. R. 241, applied.

ACTION upon an accident insurance policy.

The action was tried before WRIGHT, J., without a jury, at Hamilton.

*L. W. Sharpe*, for the plaintiff.

*R. Forsyth*, for the defendants.

November 27. WRIGHT, J.:—In this action the plaintiff sues upon an accident insurance policy issued by the defendant company on the 15th March, 1926, upon the life of Gordon H. Johnson, deceased.

The deceased met with an accident on the 27th September, 1926, resulting in his death on the 30th September, 1926.

The plaintiff is the only child of the said Gordon H. Johnson, who died intestate and a widower.

No beneficiary was named in the insurance policy, and the plaintiff, believing himself to be entitled to the proceeds of the policy, had the claim papers filled out and forwarded to the company on the 12th October, 1926. The defendant company declined to pay the claim on the ground that the deceased was under the influence of liquor at the time of the accident. The plaintiff then commenced this action on the 26th November, 1926.

In the affidavit of merits filed on behalf of the defendant company, the defences set up were:—

(a) That the deceased was intoxicated at the time of the accident resulting in his death, in contravention of the general conditions contained in the policy of insurance.

(b) That the plaintiff was not the beneficiary named in the policy of insurance and was not entitled to the moneys claimed;

(c) that the action was brought prematurely.

The plaintiff then applied for letters of administration to the estate, and the same were granted to him by the Surrogate Court of the County of Wentworth on the 9th May, 1927.

Pursuant to notice previously given, the plaintiff applied at the trial to have the proceedings amended by describing himself

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as the administrator of the estate of Gordon H. Johnson, deceased. This application was opposed by counsel for the defendants on the ground that if such an amendment were allowed the plaintiff's claim would be defeated by virtue of the provisions of the Insurance Act, R.S.O. 1927, ch. 222, sec. 187, condition 21.\* I allow the plaintiff's application to amend, subject to the right of the defendant company to plead the limitation clauses of the section of the Insurance Act already referred to.

I might mention that the other defences were abandoned at the trial and need not be discussed here.

I think the case is concluded by the decision in *Trice v. Robinson* (1888), 16 O.R. 433, where it was held that it is sufficient if the plaintiff, suing as administrator, qualifies before the trial. This decision has been followed by several cases and is the accepted law in this Province. See *Dini v. Fauquier* (1904), 8 O.L.R. 712; *Doyle v. Diamond Flint Glass Co.*, (1904), 8 O.L.R. 499.

In this case, although the plaintiff did not specifically sue as administrator of the estate, yet, as he was the person first entitled to obtain administration, it may well be considered that he brought his action as representing the beneficiary under the policy.

The effect of the decisions already cited appears to be that if the letters of administration were rightly granted they relate back so as to validate the action already commenced by the plaintiff to whom administration was granted, even though suing ostensibly in his individual right.

The principle of the decision in *Doyle v. Callow* (1849), 12 Ir. Eq. R. 241, appears to be applicable here. In the judgment of the Lord Chancellor at p. 243 it is stated: "There is abundant authority for this general proposition—that where a party files a bill with an equitable title at the time he does so, and afterwards clothes himself with a legal title not inconsistent with that, the latter has relation back, and the whole bill can be sustained."

Here the plaintiff was entitled to the entire proceeds of the policy, subject, of course, to the rights of the creditors of the estate, if any; but it is clear that he had an equitable title to the proceeds of the insurance policy.

There will be judgment for the plaintiff for the sum of \$2,000 and interest from the 12th November, 1926, being 30 days after the receipt by the defendant company of proofs of claim, with interest at 5 per cent. from that date, and the costs of action.

\* 21. Any action or proceeding against the insurer for the recovery of any claim under this policy shall be commenced within one year after the cause of action arose.

## [APPELLATE DIVISION.]

REX V. BARTON.

1928.

Nov. 29.

*Criminal Law—Indictment in three Counts Based on same Facts—Collision of Motor-vehicles — Manslaughter — Negligence Causing Grievous Bodily Harm — Wanton or Furious Driving Causing Bodily Harm—Findings of Jury—"Not Guilty" on first two Counts—"Guilty" on third Count—Criminal Code, secs. 268, 284, 285, 286 — Whether Conviction on third Count Maintainable — Joinder of Counts—Judge's Charge—Misdirection—Appeal.*

S. died shortly after a collision of motor-vehicles as the result of the collision. The defendant was indicted in three counts: (1) that he did unlawfully kill and slay S., contrary to sec. 268 of the Criminal Code; (2) that he, by an unlawful act, or doing negligently or omitting to do an act which it was his duty to do, did cause grievous bodily harm to S., contrary to sec. 284; (3) that he, having charge of a motor-vehicle, by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, did cause, or cause to be done, bodily harm to S., contrary to sec. 285. At the trial of the defendant upon the three counts the jury found him "not guilty" upon the first and second counts and "guilty" upon the third count, and he was convicted accordingly:—

*Held*, by the majority of the Court, upon appeal from the conviction, that, although the facts upon which the three counts were based were the same as to each of the three offences charged, it was open to the jury, after acquitting the defendant upon the first two counts, to convict him upon the third.

*Rex v. Stark* (1927), 60 O.L.R. 375, applied and followed, notwithstanding the difference between the indictments in the two cases.

*Rex v. Forseille* (1920), 35 Can. Crim. Cas. 171, not followed.

Discussion of the practice of joining in one indictment counts for several offences based upon substantially the same state of facts.

Although the jury appeared to have been misdirected as to the real meaning of the second and third counts, as no objection was made at the conclusion of the charge and no ground of appeal based upon misdirection raised or argued before the appellate Court, that aspect of the case was not dealt with.

*Per* MIDDLETON, J.A., dissenting:—S. was undoubtedly killed as the result of the collision. If his death was the result of the fault of the defendant, the crime was manslaughter. The finding of "not guilty" of manslaughter could only mean that in the opinion of the jury the death was not caused by the misconduct of the defendant.

AN appeal by the defendant from his conviction, upon trial before a Judge and jury at the assizes, upon the third count of an indictment, by which it was charged that the defendant, having charge of a motor-vehicle, by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, did cause, or cause to be done, bodily harm to one Albert J. Stroeckean, contrary to section 285 of the Criminal Code.

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November 14. The appeal was heard by LATCHFORD, C.J.,  
MAGEE, RIDDELL, MIDDLETON, and ORDE, JJ.A.

*J. H. Clark*, for the appellant.

*Edward Bayly*, K.C., for the Crown, respondent.

November 29. The judgment of the majority of the Court was, by direction of the Chief Justice, read by ORDE, J.A.:—The accused was tried upon an indictment containing three counts, namely:—

1. That on the 16th September, 1928, he “did unlawfully kill and slay one Albert J. Stroeckean, contrary to section 268 of the Criminal Code.”

2. That on the same date he, “by an unlawful act, or doing negligently or omitting to do an act which it was his duty to do, did cause grievous bodily harm to one Albert J. Stroeckean, contrary to section 284 of the Criminal Code.”

3. That on the same date he, “having charge of a motor-vehicle, by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, did cause, or cause to be done, bodily harm to one Albert J. Stroeckean, contrary to section 285 of the Criminal Code.”

The jury returned a verdict of “not guilty” upon the first and second counts, and a verdict of “guilty” upon the third count.

The notice of appeal sets out several grounds of appeal, but many of them are really repetitions of each other. In substance they resolve themselves into three, which cover in fact the only grounds argued before us, namely:—

1. That, as the facts upon which the three counts are based are the same as to each of the three offences charged, it was not open to the jury, after acquitting the accused upon the first two counts, to convict him upon the third.

2. That there was no evidence upon which the jury could reasonably find the accused guilty, and that the trial Judge should have withdrawn the case from the jury.

3. That the verdict was perverse.

It was made clear during the argument that in our opinion the accused could not hope to succeed upon either the second or third ground. The first ground is the only one calling for any expression of opinion.

It was argued for the appellant that the evidence established conclusively that Stroeckean died shortly after the motor-car collision, the responsibility for which is charged to the appellant, and as the result thereof; and that the only crime of which the ac-



cused can be charged by reason thereof is that of manslaughter; and that, as the jury have found him not guilty of that offence, he cannot upon the same state of facts be convicted of the lesser offence of doing bodily harm.

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This case, therefore, presents, in slightly different guise, the same question that was raised and determined in this Court in *Rex v. Stark* (1927), 60 O.L.R. 375. There the accused was indicted upon two counts, one of doing bodily harm under sec. 285, and the other of doing grievous bodily harm under sec. 284 of the Criminal Code. The accused was found guilty on both counts, but the fact that the evidence indicated that the person injured had died as a result of the collision was made a ground for the contention that the accused, if guilty at all, could only be guilty of manslaughter and could not be tried or found guilty upon the lesser charges. The majority of the Court, three of whom wrote separate judgments, were of the opinion that this contention was unsound, and that, notwithstanding that the facts as disclosed by the evidence might have been sufficient upon which to find a verdict of manslaughter, the lesser offences had not merged in the greater or otherwise disappeared.

The present case differs from the *Stark* case in having an additional charge of manslaughter laid in the indictment, which brings the case squarely within the decision of the Saskatchewan Court of Appeal in *Rex v. Forseille* (1920), 35 Can. Crim. Cas. 171.

The fact that in the *Stark* case there was no charge of manslaughter, and in the present case there is, does not, in my judgment, in any way affect the principles applicable to the question involved.

Section 856 of the Code provides for the joinder of any number of counts in the same indictment, but this practice was not introduced by the Code—it had prevailed for many years. In cases where the offences respectively charged were unconnected with each other the trial Judge exercised a discretion as to trying the different offences at the same time, and if it appeared that to try them simultaneously might prejudice the accused the charges would be tried separately. But, where the offences depended upon the same set of facts, all the charges were tried at the same time. I need only to refer to what is said as to this practice in Archbold's Criminal Pleading, Evidence, and Practice, 27th ed., p. 56: "It was well established by a long series of decisions that the joinder of two felonies in one indictment (except where the same facts may constitute several felonies, *Campbell v. Re-*

App. Div. *ginam*, 11 Q.B. 799, 812) is so necessarily unfair to the prisoner  
 1928. that the judge ought, upon an application being made to him, to  
 REX put the prosecutor to his election and send them to two trials  
 v. . . . . But it was held that the prosecution should not be  
 BARTON. put to their election when it was plain from the nature and cir-  
 Orde, J.A. cumstances of the offence charged that the accused would not be  
 embarrassed in his defence (e.g., where the acts relied upon as  
 proving the different offences charged were in substance the  
 same)."

In *Campbell v. Reginam* (1846), 11 Q.B. 799, a new trial was directed upon an indictment containing two counts. The jury had brought in a verdict of "guilty of the felony aforesaid," and the Court held this verdict to be void for uncertainty in not specifying the offences of which it found the prisoners guilty. At p. 812, Denman, C.J., after discussing whether or not the two counts really only charged one felony and pointing out that one offence cannot properly be charged twice over, whether in one indictment, or two, says:—

"It should be observed that this reasoning in no way affects cases where the same facts may in reality constitute several felonies; as for stabbing with intent to murder, and to do grievous bodily harm; forging with intent to defraud A., and also to defraud B.; in which the intent is a necessary ingredient in the felony; and many other cases which might be put, in all which two or more counts would be proper, and might be all proved; but in all such cases the counts would on the face of them appear to be different."

The practice of joining counts for several offences based upon substantially the same state of facts is so common under our criminal procedure that it seems like labouring the matter to dwell upon it, but it is, I think, important to emphasise it because any other conclusion than the one we have reached may have a far-reaching effect upon our methods of criminal prosecution. For this reason I think it not amiss to draw attention to some instances other than those mentioned in the *Campbell* case. In Roscoe's Criminal Evidence, 15th ed., p. 85 *et seq.*, forms of indictment are given, many of which contain separate counts for offences arising from the same facts: e.g., No. 5, wounding with intent to do grievous bodily harm, and malicious wounding; No. 14, arson of a dwelling house, a certain person being therein, and arson of the same dwelling house with intent to defraud; No. 18, forgery of a certain document, and uttering the document knowing it to be forged.

In our decision in the *Stark* case, as in this, we have declined to follow the judgment of the Court of Appeal in Saskatchewan in *Rex v. Forseille, supra*. With all respect to the weight of that judgment, I find it impossible to follow its reasoning. Unless there is something in cases where death ensues as the result of a negligent act to distinguish the crime from other cases where one set of facts gives rise to several distinct offences, I can see no reason for applying to the indictment here any principle different from those applicable to other types of crime.

It may be difficult to understand how, upon the evidence in a particular case, a jury could come to the conclusion that the accused had by his negligence done bodily harm to another and at the same time acquit him of manslaughter. But it is not open to us, in my opinion, to approach the matter in that way. The question is one of law simply, and I can see no legal reason for saying that a verdict of guilty of doing bodily harm is bad because upon the same state of facts the appellate court, not the jury, thinks it ought to have convicted the accused of manslaughter.

I pointed out in the *Stark* case, at p. 381 *et seq.*, that our Criminal Code is designed, by numerous overlapping provisions, to stop up the gaps through which a guilty person might otherwise escape. The long established practice preserved by sec. 856 of the Code of joining several counts in the one indictment is in furtherance of that design. If in cases like the present the Crown must charge manslaughter or nothing (and that is the effect of the opposite view in the *Stark* case and in this), then our carefully constructed system of criminal procedure is in great peril.

There is another aspect of this matter to which our attention has been called since the argument. No exception whatever was taken to the charge of the learned trial Judge either in the notice of appeal or upon the argument. The charge was not read to us, nor, as I recollect the argument, was it referred to at all. Counsel confined his argument to the point already mentioned.

Upon looking at the charge, there would appear to be *ex facie* good ground for the conclusion that the learned trial Judge had misdirected the jury upon the real meaning of the second and third counts, and particularly the third one upon which the accused was convicted. At the opening of the charge, after explaining that the first count was manslaughter, he describes the second as causing "bodily harm," whereas it was in reality causing "grievous bodily harm," and then as to the third count he says: "And the third count is that he was racing. So far as this particular case is concerned, if he was doing an unlawful act, it was

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racing or exceeding the speed-limit." It is true that a little later he reads to the jury subsec. 1 of sec. 285 of the Code, under which the third count is laid, but he adds by way of explanation the words, "Furious driving—racing, wilful misconduct or wilful neglect." No emphasis whatever is laid upon what is an essential ingredient of the offence, namely, that the negligent act or omission caused bodily harm to some person.

No objection to this as a misdirection appears to have been made at the conclusion of the charge, and, not having been made there and no ground of appeal based upon misdirection having been raised or argued before us, the only conclusion I can come to is that the addresses of counsel must have made it quite clear to the jury what the three offences charged really were and that the learned trial Judge's references to the counts and to sec. 285 of the statute were intended to emphasise the character of the negligence charged and were so understood by the jury. The appeal not having been brought upon any such ground, I can see no reason why, even assuming that we have the power to do so, the Court should deal with that aspect of the case at all.

In the opinion of the majority of the Court the appeal fails and must be dismissed.

MIDDLETON, J.A.:—In this case I am unfortunately unable to agree in the views entertained by the majority of the Court, and I have the permission of my brethren to place my views in writing.

I adhere to the opinion I entertained in *Rex v. Stark*. I should have accepted the opinion of the majority as expressed in that case as binding upon me were it not for the unfortunate result that possibly may follow from adopting that course by reason of there being no right of appeal to the Supreme Court of Canada (save in certain instances) unless there is dissent in this Court.

An appeal might have been had in the *Stark* case, but none was taken. If the Court should now be of opinion that this decision should be regarded as binding and authoritative and should be followed without dissent, then the important question involved could not be reviewed by the Supreme Court. I am anxious to afford every opportunity to the accused to discuss the question before a Court not bound by a previous decision.

This case seems to me to be one well illustrating the difficulty resulting from what I humbly think is a departure from sound principle. The unfortunate victim was undoubtedly killed as



the result of the accident. If his death was the result of the fault of the accused, the crime was manslaughter. He has been acquitted; and, as the death and the fact that the death resulted from the accident are not disputed, the finding of "not guilty" can only mean that in the opinion of the jury the death was not caused by the misconduct of the accused.

Similarly the finding of not guilty on the second count, that of causing grievous bodily harm, must mean that in the opinion of the jury the bodily harm unquestionably sustained by the deceased was not caused by the misconduct of the accused.

The finding of guilt on the third count must, in the light of the finding on the other counts, mean that the jury understood that it had the right to find this man guilty of the lesser offence while acquitting him of the only offence of which it was open to them to find him guilty upon the evidence.

The point is not precisely covered by the decision in the *Stark* case. That case only determines that the Crown Attorney may so far exercise the prerogative of mercy as to prosecute for a minor offence instead of the offence actually committed. In this case it is sought to extend this privilege to the jury.

I refrain from entering upon any further discussion of the problem presented in the *Stark* case, preferring to leave that as it is.

*Appeal dismissed (MIDDLETON, J.A., dissenting).*

The defendant's appeal to the Supreme Court of Canada from this judgment was dismissed (SMITH, J., dissenting), on the 6th December, 1928. The judgment of the majority of the Supreme Court of Canada was delivered by ANGLIN, C.J.C., [1929] S.C.R. 42.

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[IN CHAMBERS.]

HOWE V. VILLAGE OF PORT DALHOUSIE.

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*Municipal Corporations—Lowering Grade of Street—Injury to Landowner—Deprivation of Access—Remedy—Action—Pleading—No Reasonable Cause of Action Shewn—Statement of Claim Struck out with Leave to Deliver another—Municipal Act, R.S.O. 1927, ch. 233, secs. 3½, 350—Municipal Arbitrations Act, R.S.O. 1927, ch. 2½, secs. 3, 10—Absence of By-law.*

The plaintiff by her statement of claim alleged that the defendant village corporation in 1927 lowered the grade of a street in the village in front of her lands, thereby cutting off her access to her property from the street; that in July, 1928, she served on

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the defendant corporation a notice in writing requiring the corporation to proceed to have the damage to her property assessed by arbitration; but that the corporation refused to recognise her claim or to proceed to an arbitration; and she claimed a mandatory order or injunction directing the corporation to proceed under the Municipal Act to have the damage determined by arbitration or in the alternative for an award of such damages as to the Court might seem just:—

*Held*, upon the summary application of the corporation for the dismissal of the action, that the statement of claim disclosed no reasonable cause of action; but that, instead of an order dismissing the action, there should be an order striking out the statement of claim, with liberty to the plaintiff to file another if so advised.

There being no allegation in the statement of claim that the corporation was guilty of negligence in the construction of the work, and no ground alleged which would entitle the plaintiff to damages at common law, and, so far as appeared from the statement of claim—it not being permissible to look beyond the pleadings upon such an application as this—the corporation having acted within its powers in constructing the work, the only right of the plaintiff was to claim compensation for the injurious affection of her lands, under sec. 342 of the Municipal Act, and she was restricted to that right and had no right to bring an action.

*Corporation of Raleigh v. Williams*, [1893] A.C. 540, and later cases, followed.

There was no power under sec. 10 of the Municipal Arbitrations Act to refer the matter to the County Court Judge for determination as sole arbitrator.

Remarks as to the effect of the absence of a by-law authorising the construction of the work.

AN appeal by the plaintiff from an order of the Local Judge at St. Catharines dismissing the action on the ground that the statement of claim disclosed no reasonable cause of action.

The appeal was heard by WRIGHT, J., in Chambers.

*H. H. Collier*, K.C., for the plaintiff.

*A. Courtney Kingstone*, K.C., for the defendants.

November 29. WRIGHT, J.:—The statement of claim alleged that the defendant corporation in 1927 lowered the grade of Locke-street in front of the plaintiff's lands, thereby cutting off access to her premises from the street. It further alleged that on the 7th July, 1928, the plaintiff caused to be served on the clerk of the defendant corporation a notice in writing calling upon the defendants to proceed and have the damages caused to her property assessed by arbitration. The statement of claim further alleged that the defendants refused to recognise the plaintiff's claim or to proceed with the arbitration demanded by the plaintiff.

The plaintiff claims a mandatory order or injunction directing the defendant corporation to proceed under the provisions of

the Municipal Act to have the damages determined by arbitration or in the alternative that she be awarded such damages as to this Court may seem just.

Before a statement of defence was delivered, the defendants moved to strike out the statement of claim as disclosing no reasonable cause of action, and the learned Local Judge made the order appealed against.

The ground upon which the learned Local Judge proceeded was that the claim of the plaintiff, if any, could only be maintained in arbitration proceedings under the provisions of the Municipal Act, R.S.O. 1927, ch. 233; and he further held that he had no power under the provisions of sec. 10\* of the Municipal Arbitrations Act, R.S.O. 1927, ch. 242, to order the action to be transferred to himself as arbitrator.

From the material it appears that the plaintiff had applied for leave to amend her statement of claim by alleging that no by-law had been passed by the defendant corporation authorising the work in question.

Upon the argument before the Local Judge, by-law No. 556 of the defendant corporation was put in. This by-law was passed under the provisions of the Local Improvement Act (R.S.O. 1927, ch. 235), and provided for the construction of a concrete pavement on Locke-street.

The plaintiff now contends that she is not precluded from proceeding to establish her claim in an action, and is not restricted to proceeding by way of arbitration.

Counsel for the plaintiff relied mainly on the authority of *Ayers v. Town of Windsor* (1887), 14 O.R. 682. He contended that, in a case such as the present, it is necessary that a by-law should be passed directing the lowering of the grade of the street. There are dicta in the judgment in the case cited to the effect that where there is no by-law no arbitration is directed, but I do not think modern cases support that view.

Section 342 of the Municipal Act is, I think, the only provision under which the plaintiff could claim compensation, and

\* 10. Where an action has been brought or is pending the court or a judge thereof, if of opinion that the relief sought is properly the subject of a proceeding under this Act, on the application of either party or otherwise, may at any stage of the action order it to be transferred to the Official Arbitrator on such terms as to costs and otherwise as may be deemed proper; and the Official Arbitrator shall thereupon give such directions as to the prosecution of the claim before him as he may deem just and convenient; and, subject to the provisions, if any, in respect thereto in the order of transfer, the costs of the action shall be in his discretion.

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that section provides that, where land is injuriously affected by the exercise of any of the powers of a corporation under the authority of the Municipal Act or of any general or special Act, due compensation shall be made to the owner for any damage necessarily resulting from the exercise of its powers on the part of the corporation.

Subsection 2 of that section provides that the amount of the compensation, if not mutually agreed upon, shall be determined by arbitration.

It will be noted that in the present case there is no allegation in the statement of claim to the effect that the defendants were guilty of negligence in the construction of the work, nor is any ground alleged which would entitle the plaintiff to damages under the common law. So far as appears from the statement of claim, the defendant corporation acted well within its powers in constructing the work, and the authorities appear to be unanimous in holding that the pleadings only can be looked at upon a motion such as the present. It would thus appear that the only claim of the plaintiff is for compensation for the damage to her land, which she alleges was injuriously affected by the acts of the defendants.

From the decisions in *Corporation of Raleigh v. Williams*, [1893] A.C. 540, *Spratt v. Township of Gloucester* (1920), 47 O.L.R. 593, *Fieldhouse v. City of Toronto* (1918), 43 O.L.R. 491, and *East Freemantle Corporation v. Annois*, [1902] A.C. 213, it would appear to be settled law that where the compensation is given by an Act such as the Municipal Act, it is a new remedy and must be pursued in the manner prescribed by the Act which confers the right. It follows that, so far as the plaintiff's claim to damages or compensation is set up in the pleadings, she is restricted to her right to proceed by arbitration and has no right to bring an action.

The plaintiff apparently recognised that her proper procedure was to demand that arbitration proceedings be instituted by the defendant corporation to determine the amount of damages to which she was entitled, as the allegations in her statement of claim would so indicate.

Proceeding now to the consideration of the other relief claimed by her, namely, a mandatory order requiring the defendant corporation to take the necessary proceedings to assess her damages, I think this claim is entirely misconceived. Section 350 of the Municipal Act contains the provisions as to who shall be the arbitrator in such cases, and provides that the procedure to be



followed shall be that set forth in the Municipal Arbitrations Act. Upon referring to sec. 3 of this latter Act, it will appear that any person who prefers such a claim may give notice to the other party specifying the nature of the claim, the grounds thereof, etc., and the arbitrator may then proceed to hear and determine the matters in question. This Act was primarily intended to apply to proceedings before an official arbitrator. So far as procedure and appeals are concerned, these provisions apply where another arbitrator is authorised to deal with the matter. It is quite open for the plaintiff to take the proceedings indicated in sec. 3 of the Municipal Arbitrations Act, and it is entirely unnecessary to make a motion for a mandatory order, which ought only to be granted where there is no other available remedy.

It is, however, contended by the plaintiff's counsel that under sec. 10 of the Municipal Arbitrations Act the learned Local Judge had authority to refer the matter to the County Court Judge for determination as sole arbitrator. The learned Local Judge took the opposite view, holding that sec. 10 did not authorise him to transfer an action to any arbitrator except the Official Arbitrator, and in this I think he was quite right.

The provisions of this section do not deal with procedure and appeals upon arbitration, but solely with the transfer of an action brought by a party claiming relief.

The statement of claim as at present framed does not disclose a reasonable cause of action and should therefore be struck out, but the plaintiff should not be precluded from delivering another statement of claim wherein she may assert sufficient grounds of action, such as negligence on the part of the defendants in constructing the work, the absence of a by-law or its insufficiency, etc.

I do not decide that the absence of a by-law would in all cases make a municipal corporation liable as trespassers, as undoubtedly such a corporation may in the exercise of its statutory powers construct and repair highways without by-laws, but in certain cases by-laws may be necessary.

Under the circumstances, the better course to adopt will be to vary the order of the Local Judge, and, instead of dismissing the action, substitute therefor a direction that the statement of claim be struck out, with liberty to the plaintiff to file another statement of claim if so advised.

No costs of appeal.

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*Insurance (Automobile)*—*Insurance Act, R.S.O. 1927, ch. 222, sec. 175, condition 5*—“*Age-limit Fixed by Law*”—*Highway Traffic Act, R.S.O. 1927, ch. 251, secs. 16, 43, 66.*

“The age-limit fixed by law” mentioned in statutory condition No. 5, sec. 175 of the Insurance Act, which exempts the insurer from liability under an automobile insurance policy, while the automobile is being driven by a person under the age-limit fixed by law, is the age-limit of 16 fixed by sec. 43 of the Highway Traffic Act.

Sections 16, 43, and 66 considered.

*Brock v. Travellers Insurance Co.* (1914), 88 Conn. 308, referred to.

AN action for damages for injuries sustained by the plaintiff by reason of negligence of the defendant as alleged; and a claim by the defendant against the Ocean Accident and Guarantee Corporation for indemnity or relief over.

The action and third party claim were tried before RANEY, J., without a jury, at Sarnia.

*R. W. Gray*, for the plaintiff.

*C. Weir*, for the defendant.

*R. S. Rodd*, for the third party.

November 29. RANEY, J.:—The action is for damages for physical injuries to the plaintiff, who was run down on the 10th September, 1927, whilst riding his bicycle on a street in Sarnia, by the automobile of the defendant, which was being driven at the time by the son of the defendant.

The defendant was insured against liability for bodily injuries to other persons arising from automobile accident, and, the insurance company having declined to assume the defence, the Local Judge made an order adding the insurance company as a third party.

There was a jury notice by the defendant, which, on motion by the third party, I struck out.

At the conclusion of the evidence I assessed the plaintiff's damages at \$3,500, reserving judgment on the defence of contributory negligence and on the claim of the defendant over against the third party for indemnity. I am now of the opinion that there was no negligence on the part of the plaintiff contributing to the accident. That leaves for determination the question of the defendant's claim against the company under his policy of insurance.

The defence raised by the insurance company is that the plaintiff's son was under the age of 18 years at the time of the accident, and, that fact being conceded, the company says that, under a clause in the policy, it is relieved from responsibility. The clause of the policy in question is statutory condition No. 5 (Insurance Act, R.S.O. 1927, ch. 222, sec. 175), which reads as follows:—

“The insurer shall not be liable under this policy while the automobile, with the knowledge, consent or connivance of the insured, is being driven by a person under the age-limit fixed by law, or, in any event, under the age of 16 years, or by an intoxicated person.”

The neat question turns on the interpretation of the words “under the age-limit fixed by law.” The law means the statute law of Ontario, and the statute law in question is the Highway Traffic Act which was in force at the time of the accident, namely the Act of 1923, ch. 48, and the amendments of 1925 and 1927, which are consolidated in R.S.O. 1927, ch. 251. There has been no change since the accident in the sections of the Act having a bearing on the case, except as to their numbering, and it will be convenient to refer to the sections as they are numbered in the Revised Statutes.

Section 43 of the revised statute places restrictions on minors as to driving motor-cars as follows:—

“(1) No person under the age of 16 years shall drive or operate a motor-vehicle, and no person over the age of 16 years and under the age of 18 years shall drive or operate a motor-vehicle on the highway unless and until such person has passed an examination and obtained a licence as provided by section 16 of this Act.

“(2) No person shall employ or permit any one under the age of 16 years to drive or operate a motor-vehicle and no person shall employ or permit any one over the age of 16 and under the age of 18 years to drive or operate a motor-vehicle unless and until he has passed an examination and obtained a licence as provided by section 16.”

Subsection 3 enacts penalties for persons who violate subsecs. 1 and 2.

Section 16 of the revised statute, referred to in sec. 43, makes provision for licences for paid drivers, subsec. 1 reading as follows:—

“No person shall operate or drive a motor-vehicle on a highway as a chauffeur unless he is licensed so to do, and no person

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Subsection 4 of sec. 16 provides for preliminaries to the granting of licences to chauffeurs, as follows:—

"A licence shall not be issued to a chauffeur unless he files with the Department certificates that he is a fit and proper person to be so licensed, having regard to his character, physical fitness, ability to drive and knowledge of the rules of the road. One of such certificates touching the applicant's character shall be furnished by the clerk, chief constable or police magistrate of the municipality in which the applicant resides, and one other certificate touching the applicant's physical fitness, ability to drive and knowledge of the rules of the road shall be furnished by an examiner appointed for that purpose by the Lieutenant-Governor in Council and residing in the municipality in which the applicant resides."

These sections, 16 and 43, date back for their genesis to the Motor-Vehicles Act of 1908, ch. 53, secs. 1 and 2.

In its original form, sec. 2 of the Motor-Vehicles Act of 1908 reads as follows:—

"No person under the age of 17 years shall drive a motor-vehicle on a public street or highway."

While this section remained in force, the age of 17 was undoubtedly "the age-limit fixed by law." In 1912 the law was amended by raising the age-limit to 18 (statutes of 1912, ch. 48, sec. 13). Then in 1917 the section that is now subsec. (1) of sec. 43 of the Highway Traffic Act (above quoted) was introduced (statutes of 1917, ch. 49, sec. 10).

Finally, sec. 66 of the revised statute, which was brought into the Highway Traffic Act in 1925 (ch. 65, sec. 20), provides for operators' licences. It reads:—

"(1) No person other than one holding a chauffeur's licence shall operate or drive a motor-vehicle on a highway unless he holds an operator's licence issued to him under this section."

The cumulative effect of secs. 43, 16, and 66, as it seems to me, is:—

(a) that no one under the age of 16 shall drive a motor-vehicle on a highway;

(b) that no one above that age, and under the age of 18, shall drive a motor-vehicle on a highway unless he holds a chauffeur's licence;

(c) that no one above the age of 16, of whatever age, shall drive a motor-vehicle on a highway unless he holds either a



chauffeur's licence under sec. 16, or an operator's licence under sec. 66;

(d) that no one shall employ any one to drive a motor-vehicle who is not a licensed chauffeur;

(e) that any one above the age of 16 may be a licensed chauffeur if he secures the certificates called for by subsec. 4 of sec. 16, and if these certificates are implemented by the issuance of a licence.

Prior to the amendment of 1925, which is now sec. 66 of the Highway Traffic Act, the law said in effect (and it still says) that a driver between 16 and 18 was, as to his qualifications, to be treated as a chauffeur, whether he was employed for hire, or was an owner and operating his own car, or the son of an owner, or otherwise lawfully operating a motor-vehicle.

The statutory conditions of the policy in question are the Dominion statutory conditions, and clause 5, above quoted, is identical with the corresponding clause of the Ontario statutory conditions.

The policy being on a form obviously intended to be issued throughout Canada, the reason for the addition of the words "or in any event under the age of 16 years" after the words "under the age-limit fixed by law," was, no doubt, to cover cases where a provincial law might fix a lower age-limit than 16. The insurance companies desired to protect themselves "in any event" against drivers under 16, and the Parliament of Canada gave its approval to a clause in that form.

In his book on the Canadian law of Motor-Vehicles, at p. 105, Mr. Barron states his conclusion on the point in question in these terms:—

"Under the Highway Traffic Act, 1923 (Ontario), no person under the age of 16 years is permitted to drive or operate a motor-vehicle, and no person under the age of 18 years may do so, unless and until such person has passed an examination, and has obtained a licence to drive.

"If such person is over 16 years of age, and under 18, and has not obtained a licence to drive and operate a motor-vehicle, then, as he is under the age-limit fixed by law, no liability can arise under a policy when the automobile is driven by such person."

With deference, I do not agree with this interpretation of the statute.

The only "age-limit fixed by law" in the Province of Ontario is the age-limit of 16 fixed by sec. 43; after that age every

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Raney, J. one is required to have a licence, and 18 is no more the age-limit  
1928. fixed by law than is 20 or 30.

Consideration was given to similar language of a condition in an insurance policy by the Supreme Court of Appeal of Connecticut in *Brock v. Travellers Insurance Co.* (1914), 88 Conn. 308. In that case the language of the condition contained in the policy was, "This agreement shall not apply where any such automobile is driven . . . by any person under the age fixed by law or under the age of 16 years in any event." The Connecticut statute forbade the operation of motor-vehicles by unlicensed persons; one of the conditions of the issuance of a licence being that the applicant should be over 18 years of age and a proper person to receive it. But the section went on to authorise "the operating of a motor-vehicle by an unlicensed person 16 years of age or more . . . if accompanied by a licensed operator." The Connecticut case was not, in my opinion, so strong from the point of view of the insured as the present case, but the Court was unanimously of the opinion (p. 311) that "the statute unquestionably fixes 16 as the age under which a person may not in this State operate a motor-vehicle upon the highways. Under that age no person may operate such vehicle. Above that age any person may operate one if accompanied by a licensed operator, and, if licensed, as he may be if qualified after the age of 18, without being so accompanied."

In the present case no question was raised as to the son's capability. Indeed, a year and a half before the accident, when he was a little over 16, he had passed the local examiner of chauffeurs as a good driver and had been given a certificate to that effect, and also a certificate by the Chief Constable of Sarnia, as being a proper person to be licensed as such, "having regard to his character, ability to drive and knowledge of the rules of the road;" these certificates being on forms prescribed by the Department of Highways.

The defendant also submits that the insurance company is estopped by its conduct after the accident from setting up a breach of the statutory condition. At the close of the evidence I was of opinion that a case of estoppel had not been made out, though I accepted the evidence of the defendant and his witnesses as to what had transpired in the way of negotiations after the accident.

There will be judgment for the plaintiff for \$3,500 and for the costs of the action as between the plaintiff and the defendant, and for the defendant over against the third party for indemnity and for the costs of both the plaintiff and the defendant occasioned by the joinder of the third party.

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Dec. 3.

*Mortgage — Consolidation of Mortgages Held by same Mortgagee — Separate Parcels of Land—Equities of Redemption Held by one Person.*

The right to redeem a mortgage after default is an equitable right, and the right of a holder of two overdue mortgages to consolidate them is given as an incident of the equitable right to redeem. A mortgagor who is in default as to two mortgages held by the same mortgagee cannot obtain the assistance of a court of equity in redeeming one mortgage without doing equity by redeeming the other as well.

But the right to consolidate is limited to the simplest kind of case; and, where the rights or interests of others who are not parties to the suit may be involved, the Court will not go outside the record to inquire into their nature in order to determine whether or not they really affect the question.

Review of the authorities.

*Jennings v. Jordan* (1881), 6 App. Cas. 698, and *Sharp v. Rickards*, [1909] 1 Ch. 109, specially referred to.

*Beevor v. Luck* (1867), L.R. 4 Eq. 537, not followed.

J. and T., who were partners, made a mortgage to the plaintiff upon partnership land (parcel B.), and J. alone, at a later date, made a mortgage to the plaintiff, upon a different parcel of land (A.) J. became bankrupt, and the defendant was the authorised trustee of his estate. T. afterwards conveyed his undivided half interest in parcel B. to the defendant as authorised trustee of the estate of J.:—

*Held*, that the plaintiff was not entitled to consolidation, and that either mortgage might be redeemed without redeeming the other.

MOTION by the plaintiff for the opinion of the Court upon a special case stated under Rule 126.

November 22. The motion was heard by ORDE, J.A., in the Weekly Court, Toronto.

*E. M. Dillon*, for the plaintiff.

*M. H. Ludwig*, K.C., for the defendant.

December 3. ORDE, J.A.:—This action is brought to enforce a mortgage by foreclosure and for a declaration that the plaintiff is entitled to consolidate the same with another mortgage held by him.

This motion is made upon a special case stated under Rule 126, from which the following relevant facts are taken:—

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The mortgage upon which the action is brought was given on the 20th March, 1924, by John Edmonds and Thomas Edmonds as mortgagors to the plaintiff to secure the repayment of \$2,100 advanced by the plaintiff.

On the 21st July, 1924, John Edmonds gave another mortgage to the plaintiff, upon a different parcel of land, to secure the repayment of \$2,165 advanced by the plaintiff.

Default having been made under the mortgage of the 21st July, 1924, the plaintiff on the 7th September, 1927, commenced an action against John Edmonds for foreclosure; judgment for foreclosure was signed on the 22nd September, 1927; and the 13th August, 1928, was subsequently fixed as the date for redemption.

The special case is silent as to the present state of that action, but it is to be presumed that the mortgage was not redeemed, or this motion would not be necessary, and it was stated by counsel that no final order of foreclosure had yet been taken out.

On the 27th October, 1927, a receiving order in bankruptcy was made against John Edmonds, and the defendant is the authorised trustee of his estate.

The special case states that prior to the 20th March, 1924, the date of the mortgage upon which the present action is brought, John Edmonds and Thomas Edmonds were tenants in common of the parcel thereby mortgaged. By consent, a further paragraph was added to the special case stating that John Edmonds and Thomas Edmonds were partners as builders, and that the lands covered by their mortgage belonged to the partnership.

On the 19th April, 1928, Thomas Edmonds conveyed "his undivided half interest" in the last-mentioned lands to the defendant as authorised trustee of John Edmonds' bankrupt estate. I have quoted the language of the special case as to the interest so conveyed. It is not disclosed what Thomas Edmonds' proportionate interest in the partnership property really was. I assume from this that it was a half.

Copies of the two mortgages are attached to the special case as "A" and "B" respectively, and it will be convenient to refer to the parcels covered thereby by the same letters, namely, that covered by John Edmonds' mortgage of the 21st July, 1924, as parcel "A," and that covered by the earlier mortgage given by John Edmonds and Thomas Edmonds on the 20th March, 1924, as parcel "B."

By reason of the default in payment of both principal and interest due upon the mortgage of the 20th March, 1924, this



action was commenced on the 25th June, 1928. The writ was first issued against Thomas Edmonds and against the present defendant as trustee in bankruptcy of John Edmonds' estate, but by an order of the Master of the 4th July, 1928, the writ was amended by striking out the name of Thomas Edmonds as a party defendant.

The plaintiff claims to be entitled to consolidate the mortgage in question herein upon parcel "B" with the mortgage upon parcel "A"; and the question of law submitted is, "whether the plaintiff is entitled to consolidate the said two mortgages as against the defendant or whether the defendant is entitled to redeem either of the said mortgages without paying the plaintiff the amount due on both of the said mortgages."

The right to redeem a mortgage after default is an equitable one, and the right of a holder of two overdue mortgages to consolidate them is given as an incident of the equitable right to redeem. "The whole doctrine of consolidation . . . arises from the power of the Court of Equity to put its own price upon its own interference as a matter of equitable consideration in favour of any suitor:" James, L.J., in *Cummins v. Fletcher* (1880), 14 Ch.D. 699, at p. 708. It is an application of the maxim, "He who seeks equity must do equity." The mortgagor who is in default as to two mortgages held by the same mortgagee cannot obtain the assistance of a court of equity in redeeming one mortgage without doing equity by redeeming the other as well.

In its simplest form the doctrine of consolidation applies where the same mortgagor gives two mortgages, each upon separate parcels, to the same mortgagee. The doctrine has been applied where two mortgages given by the same mortgagor to different mortgagees have by assignment got into the hands of the same holder.

The neat point, whether or not the holder of two mortgages given by different mortgagors would be granted consolidation where both equities of redemption had become vested in the one person holding them in the same interest, seems never to have been decided. The point in *Sharp v. Rickards*, [1909] 1 Ch. 109, was very close to it, for there it was held that the fact that the equity of redemption in one parcel was held in trust for the owner of the equity of redemption in the other parcel, so that the real ownership of both equities was vested in the same person, did not entitle the holder of the two mortgages to consolidate, because the Court would not go behind the actual mortgagor,

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even though merely a trustee, to inquire into equitable interests. Neville, J., further lays down in broad terms (p. 114) that "the Court has never recognised a right to consolidate" where "equities of redemption originally separate have come to the same hands." While that general principle is to be deduced from the cases, I do not think that it has ever been so decided in a concrete case. There can be no doubt, however, that the whole trend of authority has been to limit the right to consolidate to the simplest kind of case and that where the rights or interests of others who are not parties to the suit may be involved the Court will not go outside the record to inquire into their nature in order to determine whether or not they really affect the question. See James, L.J., in *In re Raggett* (1880), 16 Ch.D. 117, at p. 119, and Boyd, C., in *Re Union Assurance Co.* (1893), 23 O.R. 627, at p. 637. It is true that in some cases the Court has strayed from that well-defined path, but later authority has tended to discredit them. If *Beevor v. Luck* (1867), L.R. 4 Eq. 537, could now be regarded as sound law, it would be strongly in the plaintiff's favour, for it was there decided that a security given by a partner for his own private debt could be consolidated with a security given by two or more partners for a partnership debt. James, L.J., in *Cummins v. Fletcher*, 14 Ch.D. at p. 710, expresses the opinion that that decision was wrong in principle. Later in *Jennings v. Jordan* (1881), 6 App. Cas. 698, Lord Selborne, L.C., says at p. 701: "I have much more difficulty in following, or satisfactorily explaining, the principle of some other authorities (such as *Beevor v. Luck*)," etc., and Lord Blackburn, at p. 718, makes it quite clear that, while not expressly overruling *Beevor v. Luck*, as it was not necessary to do so for the purposes of the decision, he considered *Beevor v. Luck* to have been wrong.

*Beevor v. Luck* is not binding on me, and I prefer to follow the opinion of the eminent Judges who have questioned its authority, and to hold that where, as here, a partner has given a mortgage on one parcel for a private debt, and he and his co-partners have joined in another mortgage to the same mortgagee, upon another parcel, for a partnership debt, no right to consolidate can be granted to the mortgagee.

Lord Selborne points out in *Jennings v. Jordan*, *supra*, what must necessarily be an important element in the right to consolidation, namely, that the right to redeem carries with it the right to a reconveyance. If the interests of the person who is compelled to redeem one security as the price of redeeming the other are not the same as to both securities, how can there be a

reconveyance which may not prejudicially affect the rights of others? At p. 706 Lord Selborne says: "The effect of consolidation is to make the consolidated mortgages practically one;" and he then proceeds to shew the difficulties that may arise in effecting a reconveyance where the rights of others are involved.

Quite apart from the effect of the bankruptcy proceedings, how could consolidation in the present case be enforced with due regard to the equities? Consolidation enables the mortgagee to throw the burden of both debts upon both properties. Where one is a partnership debt secured upon partnership property, and the other a private debt secured upon private property, the effect might seriously prejudice one or other of the two partners, and particularly the partner who was no party to the private mortgage given by the other, and which upon no principle whatever could he be either entitled, or called upon, to redeem. If the right to redeem both securities, with the corresponding right to a reconveyance to himself alone, is not wholly vested in the one person, there can be no right in the mortgagee to enforce consolidation.

Counsel for the plaintiff argues, however, that by getting in the estate of Thomas Edmonds, the other partner, the trustee in bankruptcy has so united the equities in himself as to entitle the plaintiff to consolidate. With this contention I do not agree. The mere acquisition of Thomas Edmonds' estate in parcel "B" cannot alter the fact that the parcel was partnership property. It was stated by counsel that what impels the mortgagee to seek consolidation is the fact that parcel "A," John Edmonds' property, will not realise enough to pay off his mortgage in full, and so the plaintiff seeks to cast the deficiency upon parcel "B," the partnership property. But the partnership property is primarily liable for the partnership debts, which must be paid in full before it can be resorted to for the private debts of either partner, and the conveyance by Thomas Edmonds to the trustee cannot in any way affect that liability. Whether or not there are any partnership debts is not disclosed, but the failure to disclose that fact is not material. To determine that question would involve an inquiry outside the record, which I think it is clear from what I have already said is enough to warrant the Court in refusing the relief sought by the plaintiff.

It was suggested that consolidation might be ordered, limited to the interest of John Edmonds in the partnership lands, which it was said was a half-interest. But the real extent of that interest would depend upon the state of the partnership accounts. I think that the same answer may be made to that suggestion as

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Orde, J.A. to the other argument. If to grant consolidation necessarily involves an inquiry into the rights of others, then consolidation will not be ordered.

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There is one aspect of this matter that was not touched upon. A foreclosure action having been commenced as to parcel "A" and having proceeded to judgment, with a report doubtless confirmed by this time and therefore binding as between the parties and those claiming under them, has not the amount required to redeem that mortgage been fixed by the judgment and the report? It may be doubtful whether, in such circumstances, the mortgagee, after bringing an action and obtaining a judgment upon one mortgage, can be permitted to consolidate that security with any other. That point not having been argued, I make no ruling upon it, but I mention it so that, if this motion goes farther, it may be raised and determined.

The answer to the question submitted by the special case will be that the mortgagee is not entitled to consolidation and that either mortgage may be redeemed without redeeming the other.

The special case does not provide for any relief to be granted as the result of this answer, though Rule 126 permits this to be done. If the parties are willing to do so, there seems to be no reason why this motion should not be turned into a motion for judgment and the appropriate judgment entered accordingly.

The plaintiff ought to pay the costs of this motion.

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[RANEY, J.]

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TORONTO GENERAL TRUSTS CORPORATION V. CANADIAN  
NATIONAL RAILWAY CO.

Dec. 14.

*Railway—Injury to Land by Excavations on Adjacent Land—Continuation of Damage—Time-limit for Bringing Action—Railway Act, R.S.C. 1927, ch. 170, sec. 391.*

In an action against a railway company for damages for injury to the lands of G. arising from borrow-pits excavated in 1911 in connection with the construction of the railway, the effect of which was, as alleged, to render the adjacent lands of G. sodden and unfit for cultivation, the jury at the trial found that the lands had been injured by the act of the company in digging the pits and omitting to drain them fully; that the injury commenced in 1912, the injured area became affected as at present in 1916, and the injury still continued:—

*Held*, that, upon the jury's findings, there was a "continuation of damage," within the meaning of the limitation section of the Railway Act of Canada; the "two years next after the doing or commit-



ting of such damage" began to run from "the doing or committing," which was in 1912, or at latest in 1916; and the action was barred.

*Kerr v. Atlantic and North-west Railway Co.* (1895), 25 Can. S.C.R. 197, followed.

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AN action for damages for injuries to a farm by excavations made by the defendants. The defendants were the Canadian National Railway Company and the Canadian Northern Ontario Railway Company.

The action was tried before RANEY, J., and a jury, at Cobourg.

*R. S. Robertson*, K.C., and *G. P. Campbell*, for the plaintiff corporation.

*R. E. Laidlaw*, for the defendants.

December 14. RANEY, J.:—The plaintiff corporation, as administrator of the estate of Emily Maria Garland, deceased, claims damages from the defendants for injuries to a farm at Brighton, arising, as is alleged, from what are known as borrow-pits, which were excavated in 1911 in connection with the construction of the Canadian Northern Ontario Railway, the allegation of the plaintiff being that the effect of the excavation of the pits and their lack of drainage was to render the adjacent lands of the Garland farm sodden and unfit for cultivation.

The defendants plead the limitation section of the Railway Act, and at the close of the plaintiff's case moved on this and other grounds for a nonsuit. I allowed the case to go to the jury for a determination of the facts, adjourning the motion for a nonsuit to be dealt with after the verdict. Questions were submitted to the jury and answered as follows:—

"1. Have the lands of the plaintiff been injured by the defendants or either of them? A. Yes.

"2. If so, what acts or omissions of the defendants caused such injury? A. The act of the defendants which caused the damage was—the digging of the borrow-pits—the omission of the defendants which caused the damage was the failure of the defendants to fully drain the borrow-pits.

"3. If the plaintiff's lands have been injured, how many acres have been affected? A. Ten acres.

"4. (a) When did such injury commence? A. 1912.

(b) When did the injured area become affected as at present? A. 1916.

(c) Does the injury still continue? A. Yes.

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"5. At what sum do you assess the yearly damages suffered by the plaintiff? A. During the years 1912-13-14-15 damage per acre being \$5 per year. On and after 1916 damage per acre being \$11 per year.

"6. To what amount is the present value of the lands of the plaintiff affected? A. \$1,000."

The limitation section of the Railway Act (sec. 391, R.S.C. 1927, ch. 170, formerly sec. 306, R.S.C. 1906, ch. 37) reads as follows (subsec. 1):—

"All actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall, and notwithstanding anything in any special Act may, be commenced within two years next after the time when such supposed damage is sustained, or if there is continuation of damage, within two years next after the doing or committing of such damage ceases, and not afterwards."

On the jury's answers there was undoubtedly a "continuation of damage," and the question for me to determine is, When did the "two years next after the doing or committing of such damage" begin to run? In my opinion, the time began to run from "the doing or committing," which was in the year 1912, or at latest in 1916. This action was commenced in 1928.

The case is governed by *Kerr v. Atlantic and North-west Railway Co.* (1895), 25 Can. S.C.R. 197, and *Chaudière Machine and Foundry Co. v. Canada Atlantic Railway Co.* (1902), 33 Can. S.C.R. 11, as applied to the section of the Railway Act in question here by *Westholme Lumber Co. v. Grand Trunk Pacific Railway Co.* (1918), 41 D.L.R. 42. In the first named case, the law was thus stated by Mr. Justice Taschereau (25 Can. S.C.R. at p. 199):—

"The prescription runs from the act which causes the damage, when the damage complained of results exclusively from that act, without any new tortious act from the tort-feasor, and when the damage complained of could have been foreseen and claimed for at the time that the *quasi* offence which caused it was committed, or within two years therefrom. Had the plaintiff then a right of action, in which he would have recovered compensation for prospective damages, including those he now claims? That is the question. If he then had that action, as the appellant here clearly had after the company's acts he complains of, the prescription runs from the time his right of action accrued."

In this view it will be unnecessary for me to consider the other defences in law raised by the defendants.

There was no evidence against the Canadian National Railway Company, and in any event the action against that company would have to be dismissed.

The action is dismissed with costs.

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Dec. 21.

[APPELLATE DIVISION.]

E. J. MAXWELL LTD. v. BANK OF NOVA SCOTIA.

*Mistake—Moneys Overpaid to Bank—Position of Bank—Agent or Intermediary—Estoppel.*

The judgment of KELLY, J., 62 O.L.R. 660, was reversed and the action dismissed, on the ground that the moneys alleged to have been overpaid by mistake were paid by the plaintiffs to the defendant bank not as principal but as agent for E., the vendor of the lumber, and that the plaintiffs, the purchasers, were estopped by their conduct from complaining that the bank had paid over or credited to E., its customer, the moneys overpaid.

*Newall v. Tomlinson* (1871), L.R. 6 C.P. 405, considered and distinguished.

AN appeal by the defendants from the judgment of KELLY, J., 62 O.L.R. 660.

October 16. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and ORDE, JJ.A.

W. N. Tilley, K.C., and Wentworth Greene, K.C., for the appellants, argued that, if any mistake occurred, which was not admitted, the appellants were not parties to it. It was not a mistake of fact causing the payment. As the appellants did with the money exactly what the plaintiffs instructed them to do, the plaintiffs were estopped from alleging that the money was paid under a mistake of fact: *Holt v. Markham*, [1923] 1 K.B. 504. The appellants did not receive the money for themselves, but as intermediaries between the plaintiffs and Ethier.

M. G. Powell, K.C., for the plaintiffs, respondents, contended that there had been an actual change of ownership, and that the provisions of the Bank Act, R.S.C. 1927, ch. 12, sec. 88, and subsec. 2 of sec. 86, vested all Ethier's interest in the lumber in the bank. To the extent of the shortage the respondents paid the money in mistake, and the bank should be ordered to return it: *Continental Caoutchouc and Gutta Percha Co. v. Kleinwort Sons & Co.* (1904), 20 Times L.R. 403; *Newall v. Tomlinson* (1871), L.R. 6 C.P. 405.

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*Tilley, K.C.*, in reply, referred to *R. E. Jones Ltd. v. Waring and Gillow Ltd.*, [1926] A.C. 670; *Merchants Bank of Canada v. Thompson* (1912), 26 O.L.R. 183.

In a subsequent memorandum submitted to the Court, counsel for the respondents referred to the following additional authorities: *Leake on Contracts*, 7th ed., pp. 66, 67; *Paget on Banking*, 3rd ed., pp. 458, 474 *et seq.*; *Kelly v. Solari* (1841), 9 M. & W. 54; *Cox v. Prentice* (1815), 3 M. & S. 344; *Bell v. Gardiner* (1842), 4 M. & G. 11; *Townsend v. Crowdy* (1860), 8 C.B. N.S. 477; *Kleinwort Sons & Co. v. Dunlop Rubber Co.* (1907), 23 Times L.R. 696; *Kerrison v. Glyn Mills Currie & Co.* (1911), 28 Times L.R. 106.

December 21. LATCHFORD, C.J.:—This appeal is from the judgment of *Kelly, J.*, of the 17th July, 1928, awarding the plaintiffs \$4,616.50 in an action for the recovery of money alleged to have been “paid under a mistake of fact or upon a consideration which had failed.”

I regard as virtually correct the several findings of fact made by the learned trial Judge, for whose opinions I have the very highest respect; nevertheless, I find myself unable to agree in the conclusion at which he arrived in this case.

As the judgment is fully reported, 62 O.L.R. 660, it is not necessary here to restate the facts.

Had the action been brought against *Ethier*, there would have been no valid defence to it; as laid against the bank, such different considerations appear to be applicable that, in my opinion, the appeal must succeed.

The letter of the 11th September, 1923, received by the plaintiffs from *Redpath*, the defendants’ manager at *Dalkeith*, was express notice of the assignment to the bank of the 4th July. It was also a direction to the plaintiffs by *Ethier*, as his signature attested, that all payments for the lumber should be sent to the bank “for deposit to his (*Ethier’s*) credit.” *Ethier* had at the time an unfettered right so to direct the plaintiffs and to constitute the defendant bank his agent or intermediary to receive the money for his benefit, or, in other words, to be a mere conduit from the plaintiffs to himself. That I regard as the interpretation placed upon the letter by the parties concerned; and the plaintiffs as well as the defendants acted accordingly on occasions during the summer of 1923.

It is true that by an instrument executed pursuant to sec. 88 of the Bank Act, the defendants held all *Ethier’s* lumber as secur-



ity for advances made and to be made; but, so long as payments for lumber shipped were made to the bank to be credited to Ethier's account, the relation of vendor and purchaser between Ethier and the plaintiffs remained unaffected. Of course the bank, by means of bills of lading, could have fully protected itself in any shipments made by Ethier. But he was receiving no orders from the plaintiffs for shipment out. The plaintiffs were in default after the end of November and had to settle with Ethier or face an action for breach of contract. The settlement was that the plaintiffs should pay Ethier, through the bank, the sum of \$12,000. The money was not paid because the bank held the lumber as security. Nor was it paid as directed in the notice of the assignment. It was not paid for shipments as that notice directed. No shipments were being made. Neither the notice of the assignment nor the assignment itself seems to me to have any bearing on the payment of the \$12,000. The purpose with which that payment was made is explicitly stated in the plaintiffs' letter of the 3rd December, 1923, transmitting to the defendants the cheque and notes. They were sent "as arranged with A. E. Ethier." That can mean nothing but that Ethier had instructed the plaintiffs to make payment. The payment was made "as a settlement" with Ethier—a settlement of what? Obviously of a claim made by Ethier. The amount was based on an estimate that later was proved to be excessive. Of the error made in the estimate or approximation the defendant bank was unaware when the \$12,000 was received, and, indeed, until December, 1926. In the meantime it had changed its position by crediting the money to Ethier, not as a mere bookkeeping entry, but in fact as an actual payment, and had made him further advances.

That the money was intended by the plaintiffs to be paid to Ethier through the medium of the bank is most clearly disclosed in the evidence of E. B. Maxwell, the vice-president of the plaintiff company, who on cross-examination was asked by Mr. Greene:—

"You were aware that when you were sending any note or cheque to the bank you were sending it there at Ethier's request? A. Yes; we understood that.

"Q. And that it would be dealt with by Ethier and the bank according to their account between them? A. Yes; to be dealt with by the bank for Ethier's benefit."

The bank did deal with the \$12,000 for Ethier's benefit, as it was the common intention of Ethier and Mr. Maxwell that it should. It acted throughout in the utmost good faith. Its true position in regard to the \$12,000 was merely that of an inter-

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mediary between the plaintiffs and Ethier, on the authority of both.

If, however, the bank was not, in the circumstances, a conduit-pipe of payment by buyer to seller, and the overpayment is capable, as I doubt it should be, of being regarded *quoad* the defendant bank as a mistake of fact, the mistake was not, in my opinion, such as could properly support the judgment in appeal.

The law as to mistake of fact, though difficulties may lie in applying it, has been clear since the days of Lord Mansfield. Little of worth seems to have been added to the foundations which that great judge laid down in *Buller v. Harrison* (1777), Cowp. 565. The question was whether money was recoverable which had been paid under a mistake of fact to an agent and placed by him in an account of his principal but not paid over—"merely book entries," as Rigby, L.J., said in *Owen & Co. v. Cronk*, [1895] 1 Q.B. 265, 275, in commenting on the case.

In delivering judgment making absolute a rule for a new trial on the ground that the jury were "entangled" as to whether the entry constituted payment, Lord Mansfield said (Cowp. at p. 568):—

"Now, the law is clear, that if an agent pay over money which has been paid to him by mistake, he does no wrong; and the plaintiff must call on the principal . . . . In this case, there was no new credit, no acceptance of new bills, no fresh goods bought or money advanced. In short, no alteration in the situation which the defendant and his principals stood in towards each other."

In *Newall v. Tomlinson*, L.R. 6 C.P. 405, cited in the Court below, the parties, although brokers and acting for undisclosed principals, were held to have dealt with each other in the transaction in question as principals. The defendants were therefore held liable for moneys received from the plaintiffs under a mistake of fact just as Ethier would be held liable to the plaintiffs had he been sued in the circumstances of the present case.

In *Continental Caoutchouc and Gutta Percha Co. v. Kleinwort Sons & Co.*, 20 Times L.R. 403, the Court of Appeal, affirming the judgment of Bigham, J., 19 Times L.R. 427, held the defendants liable for a sum of £1,480. 15s. 11d. paid to them owing to a blunder made by one of the plaintiffs' clerks. The payment should have been made to another firm. It was contended by the defendants that, as they had placed the money to the credit of Kamrisch & Co., of whom they were agents as well as equitable assignees, they were not bound to repay. This defence was held

to be ineffective. The ground of the decision in the Court of Appeal, as in the Court below, is that the money as the result of a mistake of fact was received by the defendants as principals, and not as agents. The test applied by the Master of the Rolls, 20 Times L.R. at p. 405, is that, had the sum due from the buyer been deposited with a third party and become the subject of an interpleader issue between Kamrisch and the defendants, it must have been awarded to the defendants.

The same defendants were equally unfortunate in a similar case, *Kleinwort Sons & Co. v. Dunlop Rubber Co.*, 23 Times L.R. 696, an appeal from the Court of Appeal to the House of Lords. Although the jury found that the money was paid to the appellants as agents of Kamrisch, they also found that Kleinwort & Co. received it as principals and that they were not led by the respondents' mistake to alter their position with regard to Kamrisch to their own disadvantage.

The head-note, which embodies the reason on which the dismissal of the appeal was based, so tersely states the law that it is worthy of quotation:—

"Whatever may, in fact, be the true position of the defendant in an action brought to recover money paid to him in mistake of fact, he is liable to refund it if it be established that he dealt as a principal with the person who paid it to him. Whether he will be liable if he dealt as agent with such a person will depend upon whether, before the mistake is discovered, he has paid over the money he received to his principal, or has settled such an account with his principal as amounts to payment, or has done something which has so prejudiced his position that it would be inequitable to require him to refund."

In both of these cases, money intended for one firm was, by mistake of fact, paid to another.

Nothing comparable has occurred in the present case. The \$12,000 was paid to the defendants as the firm remitting it intended that it should be paid, and the defendants credited and paid over the money to Ethier in the manner which the plaintiffs intended they should do. There was no mistake such as gives rise to a cause of action.

The appeal, in my opinion, should be allowed and the action should be dismissed—in both cases with costs.

RIDDELL, J.A.:—One Ethier, being the owner of certain lumber, made a contract of sale of some 300,000 feet, all to be shipped by the end of November, 1923, to the plaintiffs, a firm of dealers in

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APD. Div. Montreal. Some deliveries were made, when the vendor, requiring to be carried by his bank, made a security under sec. 88 of the Bank Act, R.S.C. 1927, ch. 12, to the defendant bank.  
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"The Bank of Nova Scotia,  
Dalkeith, Ont.

September 11th, 1923.

"Messrs. E. J. Maxwell Ltd.,  
Montreal, Que.

"Dear Sirs:—

"As our customer Mr. A. E. Ethier has assigned his lumber to the above bank it will be necessary that all cheques for lumber shipped to you from him will be sent direct to this bank for deposit to his credit, such cheques to be made payable to 'The Bank of Nova Scotia.' Mr. Ethier's signature below hereby confirms these instructions.

"Will you kindly acknowledge receipt of same and oblige,

"Yours faithfully,

"W. Redpath,

"pro. Manager,

"A. E. Ethier."

Some delays took place in delivering the lumber and there was some dispute as to the lumber included in the contract; but these are of no importance at this time.

The cullers estimated that there was still on hand and to be delivered about \$15,000 worth, and the purchasers thought it safe to advance some money on the contract; accordingly, following the direction in the notice of the 11th September, 1923, they drew a cheque in favour of the bank for \$5,000, and also two notes for \$3,500 each, one due on the 15th December, and the other on the 30th December, 1923, both being dated the 3rd December, 1923, and both endorsed by the plaintiffs, before being sent, thus: "For account A. E. Ethier." These were accompanied by a letter in the following terms:—



"E. J. Maxwell Limited,  
279 St. Antoine-street,  
Montreal.

"December 3rd, 1923.

"The Bank of Nova Scotia,  
Dalkeith, Ont.

"Dear Sirs,—

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"As arranged with Mr. A. E. Ethier last week, as a settlement for the approximate stock of lumber in his yard, we enclose herewith our cheque for \$5,000, and two notes due December 15th and 30th respectively for \$3,500 each. We trust that this will be satisfactory to you.

"The quantity of lumber Mr. Ethier cut this year is greatly in excess of the quantity we considered it would be, but the greater part of it will be cleaned up before the end of this month.

"Yours truly,

"E. J. Maxwell Limited,

"C. A. Roberts,

"Sec.-Treas.

"Kindly acknowledge receipt and oblige."

The bank put the proceeds to the credit of Ethier; he withdrew sums from time to time, and at length he became unable to pay his debts in full. The amount of lumber on hand turned out to be considerably less than estimated; the plaintiffs did not receive sufficient to cover their advance; and they brought this action against the bank for "money had and received," money paid under mistake of fact.

At the trial, Mr. Justice Kelly gave judgment for \$5,670.73, the amount by which the price of the lumber as delivered fell short of the amount sent to the bank in December, 1923, and interest from the time of payment; the bank now appeals.

The judgment proceeds on the principles laid down in *Newall v. Tomlinson*, L.R. 6 C.P. 405—the remarks of Brett, J., on p. 410, being specially referred to.

I think that the rule is better laid down by Montague Smith, J., in the same case, and the real question is: "Did the bank receive the money on its own account and have a right so to receive it and appropriate it to its own use or did it receive it for Ethier and to hand it over to him?" Surely, had the bank done anything else than hand over the money to Ethier or the equivalent of putting it to his credit and letting him draw upon it, it

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would have been violating the terms upon which it was sent. I can see no ground to make the bank liable.

There are other objections, some but another way of putting that already expressed: e.g., the bank did exactly as it was intended by the plaintiffs that it should. It obeyed the instructions of the persons who gave it the money; and they cannot complain of this conduct.

Again, the plaintiffs represented to the bank that the money sent was what had been "arranged with Mr. Ethier . . . as a settlement for the approximate stock . . . " without a word as to the amount being subject to be reduced in case of some mistake having been made; on this statement by the plaintiffs themselves the bank acted as the plaintiffs requested them. Would not the plaintiffs and Ethier as well have had reason to complain if the bank, in the face of the specific statement and the previous instructions, had set up that it had the right to hold this money in a suspense account until the whole account had been complete and the lumber delivered? Nothing of the kind was in contemplation at the time; and, beyond question, the bank was justified, even compellable, to act as it did. On the plainest grounds of estoppel, the plaintiffs cannot succeed — they are the innocent party (if they are innocent) whose conduct occasioned the loss, and it would be against all principles of equity and natural justice if the loss occasioned by the plaintiffs' representations and conduct should fall upon the bank, equally, if not more, free from fault.

I do not consider whether there may not be a defence based on the hypothesis that the only mistake here, i.e., a mistake as to the amount of lumber available, was not the cause of the overpayment; i.e., at the most, it was but a condition, *causa sine qua non*, and not an efficient cause, *causa causans*, of this payment. Much has been said and written as to this principle, but I do not think it advisable to enter into the inquiry here. Most of the learning on the subject will be found in *R. E. Jones Ltd. v. Waring and Gillow Ltd.*, [1926] A.C. 670, and the cases cited.

Whether on the ground (1) that the bank did not receive the money for itself, or (2) that the bank did precisely what the plaintiffs directed it to do, or (3), what may be considered practically the same as (2), that the plaintiffs are estopped by their conduct, I think this action is not well-founded; whether there are other grounds for the same conclusion, I do not decide.

I think the appeal should be allowed with costs here and below.

ORDE, J.A.:—I agree that this appeal must be allowed and the action dismissed with costs.

The facts are fully set forth by the learned trial Judge and need not be repeated. It is important, however, to keep clear the exact legal position of the three parties concerned in the transaction, namely, Ethier, the plaintiff company, and the defendant bank, with reference to the moneys payable under the contract and the lumber covered thereby at the time when the payments in question were made.

It is quite clear that the bank's rights were those of a mortgagee, and that the provisions of the Bank Act as to the effect of the security given under sec. 88, in vesting the title of the customer in the goods covered by the security, does no more than convey the legal estate therein to the bank, just as the legal estate in lands or in goods passes to the mortgagee under an ordinary mortgage thereof. The bank never became the owner either of the goods or of any moneys payable under the contract in any absolute sense, or otherwise than by way of security for Ethier's indebtedness to it.

The letter of the 11th September, 1923, from the bank and Ethier to the plaintiffs, directing that all further payments should be made to the bank for deposit to Ethier's credit, stated that Ethier had assigned his lumber to the bank. It is not, in my judgment, of any consequence, but the statement was not at that date strictly accurate. At that time the bank held Ethier's promise to give securities under sec. 88 upon any lumber then or thereafter in his lumber-yard, dated the 17th February, 1923, and his agreement as to the powers which the bank might exercise in respect of any securities so given, dated the 23rd March, 1923. But these instruments, while perhaps giving some equitable title, were merely the foundation for the securities when actually given in order to validate them under the express provisions of para. (b) of sec. 90 of the Bank Act.

In addition, the bank had also, on the 4th July, 1923, obtained the assignment from Ethier of the debts then owing or accruing due or which might thereafter become due or owing to Ethier under his contract with the plaintiff company, but this assignment, though it transferred to the bank the title and ownership in the moneys payable under the contract, is expressly stated to be taken only as collateral security for Ethier's indebtedness, so that as to the moneys the bank's title was not absolute but merely that of a mortgagee.

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On the 21st November, 1923, Ethier gave his first security under sec. 88, so that, at the date when the payment in question was made, the bank's title as a mortgagee of the lumber and of any moneys payable under the contract for the sale thereof was complete, but it was nevertheless merely the title of a mortgagee and no more.

If the bank had thereupon proceeded to exercise its rights as mortgagee and to deal with the plaintiff company direct with respect to the disposal of the lumber or the enforcement of any rights of Ethier as vendor under the contract, the contention that any moneys paid by the plaintiff to the bank in consequence thereof and under some mistake of fact, should be refunded, would rest upon more solid ground, for in such case the bank would probably be bound as a principal to repay unless protected by some estoppel arising from the conduct of the plaintiff company.

But that is not what happened here. Just what the liability of the bank might be if, in response to a demand, by virtue of its assignment of the moneys payable under the contract, for payment of the balance then believed to be due, the plaintiffs by mistake paid a larger sum than that actually payable, might be a nice question. The position would be very much like that in *Newall v. Tomlinson*, L.R. 6 C.P. 405, and *Kerrison v. Glyn Mills Currie & Co.*, 28 Times L.R. 106. Here the situation was entirely different. The bank was, of course, seeking to protect itself by virtue of its securities and for that reason had procured Ethier's direction along with its own to pay over any moneys payable to Ethier to the bank for deposit to his credit, but beyond that it interfered in no way with the performance of the contract and left it to the parties to carry it out as they saw fit. The bank was no party to the arrangement whereby, to avoid the removal of the lumber from Ethier's yard in November, the plaintiff company was to pay \$12,000 on account of the contract based upon an estimate of the lumber still on hand to answer it. It would be a matter of some doubt whether or not, even as between Ethier and the plaintiff company, had the mistake in the estimate been immediately discovered, the plaintiff company could have recovered back any part of the \$12,000 until the exact amount ultimately payable upon the contract had been ascertained. The \$12,000 was really paid as a lump sum on account of what was believed to be a larger sum then or thereafter due to Ethier. The mistake made in assuming that some of the lumber in the yard was covered by the contract, when in fact it was not, was not, in the



circumstances, like an arithmetical mistake in calculating a sum then actually due, when upon the discovery of the mistake the real amount which should have been paid can be determined exactly. It is impossible here to say how much the plaintiff company would have been willing to pay on account of the contract had the exact amount of lumber in Ethier's yard referable to the contract been known.

An examination of the state of Ethier's account with the bank shews that after the moneys were received from the plaintiffs they were applied partly in reduction of Ethier's indebtedness to the bank and partly as directed by Ethier; but, what is of more importance, the bank made fresh advances to Ethier upon further securities given from time to time and so altered its position in consequence of the payment by the plaintiffs as to prejudice it if it should be obliged to make any refund thereof.

I think it is questionable whether the alleged mistake here can be considered as coming within the range of the bank's relationship to the contract between Ethier and the plaintiffs. It really occurred in the course of an arrangement which, while relating to the contract it is true, was really outside it. If immediately discovered and before any application of it upon Ethier's account had been made by the bank, the bank might be compelled to refund the money, but that would be merely because of Ethier's liability and because the moneys would be earmarked. But, when used and applied on Ethier's account, I find it difficult to see how the bank can be regarded as a principal so far as this particular transaction is concerned. It really received the money on behalf of Ethier and for his account; the money has been so applied; and, while some part of it has gone to reduce his liability to the bank, the bank has in consequence thereof so dealt with Ethier as to render it unconscionable and inequitable that it should now be called upon to repay it.

MIDDLETON, J.A., agreed with ORDE, J.A.

*Appeal allowed.*

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## [APPELLATE DIVISION.]

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MORTON V. CANADIAN CREDIT MEN'S ASSOCIATION LTD.

Dec. 21.

*Landlord and Tenant—Bulk Sale of Goods by Tenant—Acceleration of Rent under Clause in Lease—Bulk Sales Act, R.S.O. 1927, ch. 167, sec. 4—Assignments and Preferences Act, R.S.O. 1927, ch. 162.*

A lease of shop premises contained a proviso that if the term should be taken in execution or attachment, or if the lessee should make any assignment for the benefit of creditors, or, becoming bankrupt or insolvent, should take the benefit of any Act in force for bankrupt or insolvent debtors, the then current month's rent and the rent for the three months following should immediately become due and payable and the term forfeited and void. During the term, the lessee made a bulk sale of the goods in the shop, and the defendant company was appointed trustee under the provisions of the Bulk Sales Act:—

*Held*, that the making of a bulk sale did not bring the proviso into operation.

Section 4 of the Bulk Sales Act makes the Assignments and Preferences Act applicable to the distribution of the bulk sale purchase-money; but the latter Act does not give a landlord a preferential lien for unearned rent.

AN appeal by the plaintiff from the judgment of the County Court of the County of York in an action to recover \$360 alleged to be due under two leases of shop premises to one White. The plaintiff claimed arrears of rent and three months' accelerated rent as payable under each lease. By the judgment of the County Court the plaintiff was awarded \$60 for arrears without costs. The claim for accelerated rent was disallowed.

November 1. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and ORDE, JJ.A.

A. C. *Heighington*, K.C., for the appellant, argued that under the Bulk Sales Act, R.S.O. 1927, ch. 167, sec. 4, and under the Landlord and Tenant Act, R.S.O. 1927, ch. 190, sec. 37, he was entitled to a preferential lien for accelerated rent for the months of September, October, and November, 1927: *Lazier v. Henderson* (1898), 29 O.R. 673.

J. M. *Bullen*, for the defendant company, respondent, contended that the learned trial Judge was right in holding that the making of a bulk sale did not bring the acceleration proviso in the lease into operation. The Assignments and Preferences Act, R.S.O. 1927, ch. 162, does not give a landlord a preferential lien for unearned rent. Reference to *Interlake Tissue Mills Co. Ltd. v. George Everall Co. Ltd.* (1921), 50 O.L.R. 165; *Re St. Thomas Cabinets Ltd.* (1921), 50 O.L.R. 492.

December 21. The judgment of the Court was read by ORDE, J.A.:—The plaintiff is the lessor under two leases of shop premises to one White. Each lease contains the following proviso:—

“That if the term hereby granted shall be at any time seized or taken in execution or in attachment by any creditor of the said lessee, or the said lessee shall make any assignment for the benefit of creditors, or, becoming bankrupt, or insolvent, shall take the benefit of any Act that may be in force for bankrupt or insolvent debtors, the then current month’s rent and the three months following shall immediately become due and payable, and the said term shall immediately become forfeited and void.”

During the currency of the term, White made a bulk sale of the goods contained in one of the shops, and the defendant company was appointed as trustee under the provisions of the Bulk Sales Act, R.S.O. 1927, ch. 167, to receive and distribute the purchase-moneys.

The action is brought to recover certain arrears of rent and also for three months’ accelerated rent claimed to be payable under each lease.

The only question involved in this appeal is the claim of the plaintiff to a preferential lien for three months’ accelerated rent alleged to have become due under the proviso in the lease quoted above, by virtue of the Bulk Sales Act. The learned County Court Judge dismissed this claim, holding that the making of a bulk sale did not bring the proviso into operation.

The learned trial Judge was right in so holding. There is nothing in the proviso to bring the making of a bulk sale within its scope. There has been no execution or attachment against the lessee. A bulk sale is not an assignment for the benefit of creditors, nor does the mere making of it make the vendor a bankrupt or an insolvent under any Act in force for bankrupt or insolvent debtors, though, if made without complying with the provisions of the Bulk Sales Act, it may constitute an act of bankruptcy under para. (h) of sec. 3 of the Bankruptcy Act, R.S.C. 1927, ch. 11, and so become the foundation of proceedings in bankruptcy. As was pointed out in *Re St. Thomas Cabinets Ltd.*, 50 O.L.R. 492, the Bulk Sales Act applies to all bulk sales, even those made by a solvent vendor. And consequently there can be no justifiable presumption of bankruptcy or insolvency from the mere making of the sale, especially if the vendor complies with the Bulk Sales Act when making it. So that neither upon a strict interpretation of the terms of the proviso above quoted nor by any implied extension of its meaning can there be any ground

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for holding that because the lessee has seen fit to make a bulk sale and to protect the purchaser by complying with the Bulk Sales Act, the lessor is entitled to declare the term forfeited and to demand a bonus of three months' rent.

Mr. Heighington argued that sec. 4 of the Bulk Sales Act had the effect of entitling the plaintiff to a preferential claim for the bonus or accelerated rent. If the Assignments and Preferences Act, R.S.O. 1927, ch. 162, which by the terms of sec. 4 is made applicable to the distribution of the bulk sale purchase-money, had expressly given a landlord a preferential lien for unearned rent there might be good ground for the contention, but the Assignments and Preferences Act does no such thing. A landlord's claim for accelerated rent, when there is an assignment under that Act, must depend upon his contract. He cannot get it otherwise.

So that neither according to the terms of the leases nor under the provisions of any statute is there any ground for the plaintiff's claim, and the appeal must be dismissed with costs.

*Appeal dismissed.*



## [APPELLATE DIVISION.]

ST. REGIS PASTRY SHOP AND BAUMGARTNER V. CONTINENTAL  
CASUALTY CO.

1928.

Oct. 24.

Nov. 27.

*Insurance (Automobile)—Indemnity in Respect of Liability for Injury to others—Action against Insurance Company—Statements Purporting to be Made by Assured Set out in Policy—Absence of Application — Adoption of Policy — Falsity and Materiality of Statements—Responsibility of Agent or Broker—Insurance Act, R.S.O. 1927, ch. 222, sec. 171(1)—Effect of.*

By a policy issued by the defendants they insured the plaintiff against any loss or damage which he might suffer by reason of his motor-truck injuring some other person. Certain statements set out on the face of the policy purported to be made by the plaintiff, and one of them was to the effect that he had had no accidents with an automobile owned or operated by him. This was not true, but the statement was not in fact made by the plaintiff—it was made by an insurance broker who procured the policy for the plaintiff, who himself signed no application and made no statements:—

*Held*, that he must be taken to have accepted the contract when he made a claim in respect of an accident and accepted the defendants' act of indemnifying him against the person who was then claiming from him.

Another accident occurring, the plaintiff brought this action for indemnity under the policy, and the defendants set up as a defence that the statement referred to was false and was material:—

*Held*, that the plaintiff was bound by the statement, unless sec. 171 of the Ontario Insurance Act, R.S.O. 1927, ch. 222, prevented his being bound, or unless the broker's knowledge relieved the plaintiff of responsibility.

*Thomson v. Maryland Casualty Co.* (1906), 8 O.W.R. 598, followed.

And *held*, that the knowledge of the broker did not bind the defendants, acting simply upon an application forwarded by him, and not ratifying by a policy a contract already made by an agent.

*Bawden v. London Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q.B. 534, distinguished.

As to the statute, *held*, that in the case of a policy issued without the written application required by sec. 171(1), but adopted by both parties, the assured is bound by material misrepresentations set out in the policy; and the plaintiff's action was dismissed, the misrepresentation being considered material as well as false.

The words added to the section which is now sec. 171(1) since the decision in *Holdaway v. British Crown Assurance Corporation Ltd.* (1925), 57 O.L.R. 70, by (1926) 16 Geo. V. ch. 49, sec. 17, had not displaced the effect of the decision in that case; and it was applied and followed.

AN action by Baumgartner, who carried on business in the name of the St. Regis Pastry Shop, against the Continental Casualty Company, brought to recover indemnity under a policy issued by the defendants whereby they insured the plaintiff against any loss or damage which he might suffer by reason of his motor-truck injuring some other person. The plaintiff's

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vehicle ran down a person who sued the plaintiff and recovered judgment against him for \$9,000. The plaintiff claimed from the defendants indemnity against that loss, or part of it, under the policy.

October 24. The action was tried before ROSE, J., without a jury, at Ottawa.

*A. E. Fripp*, K.C., for the plaintiff.

*R. S. Robertson*, K.C., and *J. P. Walsh*, for the defendants.

ROSE, J. (at the trial, after hearing the evidence and the arguments of counsel):—I do not think that much is to be gained by my taking time to consider this case, which has been argued very fully. The policy, according to the plaintiff, was not one for which he applied or authorised any one else to apply, and the contract, on the plaintiff's statement, came into existence only when the policy, having been written by the company and sent by Perley (an insurance broker) to the plaintiff, was accepted by the plaintiff as a contract of insurance. To treat the plaintiff's language literally, he never consciously accepted the policy of the defendant company, and the relationship of insurer and insured never came into existence; but it might be unfair to deal with the case upon so literal a construction of the plaintiff's statement, for I imagine that, even if he did not accept the contract originally, he did so at least when he made a claim in respect of the first accident and accepted the company's act of indemnifying him against the person who was then claiming from him.

Treating the case, then, as if the policy had been accepted in the first instance by the plaintiff, it is to be disposed of upon the effect of the statement, admittedly a misstatement, contained in item 11 of the statements printed on the face of the policy,<sup>1</sup> unless the Insurance Act renders it impossible to give effect to that misstatement, or unless the plaintiff is not bound by that misstatement for the reason that Perley had knowledge of the fact that a motor-car owned by the plaintiff had been involved in accidents. Apart from the statute, there seems to me to be no

<sup>1</sup>Item 11 read as follows: "The fact of any accident with an automobile owned or operated by the insured involved has been as follows:" And a blank space following was filled in by the words, "No exceptions." The plaintiff, in the witness-box, was asked: "That did not disclose the real facts with reference to the accidents that you had had with your automobile, did it?" And he admitted that it did not, but said, "It was beyond my knowledge."

doubt that the plaintiff, accepting a policy worded as this one is, would be bound by the statement that has just been referred to, and the reason why he would be so bound is stated shortly in the case cited by Mr. Robertson, *Thomson v. Maryland Casualty Co.* (1906), 8 O.W.R. 598. Chief Justice Moss, at p. 601, put the matter thus:—

“The question is not whether the statements were made by the assured or were filled up by some one else, or whether they were made in good faith and without knowledge of their want of truth, but whether the policy was obtained and a contract entered into upon the basis of the statements. If they form a basis of the contract of insurance, they bind the plaintiff when suing to enforce the contract.”

The plaintiff, then, I say, would be bound by the statements unless the statute prevents his being so bound, or unless Perley's knowledge relieves him of responsibility. For the proposition that Perley's knowledge relieves the plaintiff of responsibility, Mr. Fripp cites *Bawden v. London Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q.B. 534, and other cases, some of which are referred to in Porter on Insurance, 7th ed., pp. 436, 437, and 439; also the case of *Mahomed v. Anchor Fire and Marine Insurance Co.* (1913), 48 Can. S.C.R. 546. I think, however, that the rule is really to be gathered from the other line of cases, some of which have been cited by Mr. Robertson. Those that Mr. Robertson cites are the cases always cited on a discussion of this particular question: *Sowden v. Standard Fire Insurance Co.* (1880), 5 A.R. 290, especially at p. 301; *Billington v. Provincial Insurance Co.* (1879), 3 Can. S.C.R. 182; and *Shannon v. Gore District Mutual Fire Insurance Co.* (1875), 37 U.C.R. 380. I do not think that the knowledge of such an agent as Perley appears to have been<sup>2</sup> ought to be held to bind the company acting, as this company did, simply upon an application forwarded by Perley, and not, as in the *Bawden* case, ratifying by a policy a contract already made by an agent.

Then we come to the statute, which, as it stands at present and as it stood at the time of the delivery of the policy, is printed in

<sup>2</sup> The plaintiff said in the witness-box that Perley looked after all his insurances for him. Another witness, Mr. Mix, the general superintendent of the defendant company, was asked, on cross-examination “Was George F. Perley an agent for your company in Ottawa? A. He did some business for us, yes. Q. For how long prior to this policy? A. At different times, probably over a period of four years, we received small amounts of business from him. Q. And you did business with him, you issued policies, did you, on applications sent by him? A. Yes.”

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the Ontario Insurance Act, R.S.O. 1927, ch. 222, sec. 171<sup>3</sup>. The effect of subsec. 1 of sec. 171, without the words in the last three lines, added by a statute of 1926, 16 Geo. V. ch. 49, sec. 17, was discussed in the case of *Holdaway v. British Crown Assurance Corporation Ltd.* (1925), 57 O.L.R. 70, and the conclusion there reached, that, in the case of a policy issued without the written application required by the subsection, but adopted by both parties, the assured was bound by material misrepresentations set out in a manner similar to the manner in which the misrepresentations were set out in the policy in question here, is, I think, conclusive of this case, unless the added words have displaced the effect of the decision in the *Holdaway* case. I do not think those added words have had the effect contended for. Exactly what their full effect may be I do not know. One effect obviously is that the insurer is declared to be unable to take advantage of misstatements made by the assured otherwise than in a written and signed application; that is to say, the words seem to exclude the effect of parol misrepresentations. Whether they go any farther than that I do not know, but I do not think they can possibly be held to exclude the effect of misstatements set forth on the face of the policy in the way in which they are set forth in the present case, where, the policy being one of those prohibited policies, the assured chooses to accept it and to rely upon it as evidencing the contract upon which he sues. I think, then, that, as in *Thompson v. Maryland Casualty Co.*, *supra*, the plaintiff is bound by item 11 of the statements, and that he is precluded from recovery if the statements are material and false. There is no doubt that they are false, and upon the evidence of Mr. Mix and Mr. Bentley<sup>4</sup> there can be no possible doubt that they are material.

The action, therefore, in my opinion, fails and must be dismissed with costs.

The plaintiff appealed from the judgment of ROSE, J., upon the following grounds:—

<sup>3</sup> 171.—(1) No insurer shall make any contract for a period exceeding fourteen days without a written application therefor, signed by the applicant or his agent, duly authorised in writing, and no statement of the applicant shall be used in defence of a claim under any contract unless it is contained in such a written and signed application.

(2) In the preceding subsection the expression "agent" shall be deemed to exclude an automobile finance or acceptance corporation, an automobile dealer, an insurance agent or broker, and any officer or employee of such corporation, dealer, agent or broker. . . .

<sup>4</sup> These witnesses were respectively the general superintendent of the defendant company and the supervisor of the automobile department of another insurance company.



1. The judgment was against the evidence and the weight of evidence and wrong in law.

2. The learned Judge should have found that the insurance broker, Perley, was the agent of the defendants in effecting the insurance upon the plaintiff's motor-truck, and the defendants were bound by the untrue answers contained in the application for the insurance made by Perley, and liable in law on the ground of estoppel.

3. The learned Judge should have found that Perley was not authorised in writing to sign the application for the plaintiff, as required by the Insurance Act, R.S.O. 1927, ch. 222, sec. 171, and therefore no untrue and fraudulent answers contained in the application for the insurance could be set up as a defence to the plaintiff's claim in this action.

Rose, J.

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November 27, 1928. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and ORDE, J.J.A.

*Fripp, K.C.*, for the appellant.

*Robertson, K.C.*, for the defendants, respondents.

THE COURT, at the conclusion of the hearing, dismissed the appeal with costs, agreeing with the judgment of ROSE, J., and the reasons given therefor.

#### [APPELLATE DIVISION.]

NEW YORK CENTRAL RAILROAD CO. v. JOSEPH DOLAN & SONS LTD.

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*Railway—Carriage of Goods—Freight Rates—Agreement with Agent of Railway Company—Action against Consignees for Additional Charges according to "Special Joint Tariff"—Absence of Bill of Lading—Bills of Lading Act not Applicable—Liability for Freight not on Consignees—Effect of Railway Act of Canada, secs. 314, 355—Mistake.*

An agent of the plaintiff company in 1922 solicited from the defendants, who were dealers in coal, the business of carrying the defendants' supplies from Pennsylvania to Ottawa, in Ontario. The defendants said that they would transfer the business from another railway company if the freight charge would be the same. The agent agreed to this, and the transfer was made. The defendants received their coal over the plaintiff company's line, were charged at the stipulated rate, paid accordingly, and sold their coal at a price based upon this freight charge. After this had been going on for some months, the plaintiff company, alleging that it had

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discovered that the rate it was entitled to charge, according to a special joint tariff for coal, "duly filed with the Board of Railway Commissioners," was \$1.20 more than it had been receiving, brought this action to recover the difference:—

*Held*, that, as no bill of lading accompanied any car-load of coal received by the defendants, the Bills of Lading Act, R.S.C. 1906, ch. 118, now R.S.C. 1927, ch. 17, had no application; and at common law there was no obligation on the consignee to pay the freight to a common carrier.

*Held*, also, that the provisions of the Railway Act of Canada—secs. 314 and 355 were specially relied upon by the plaintiff company—did not impose upon the plaintiff company a duty to enforce the payment of tolls at the rate fixed by the tariff.

*Held*, also, that if there was a mistake it was not induced or contributed to by the defendants.

And, for those reasons and others, the action was dismissed.

IN 1922, the defendants, coal-dealers in Ottawa, were importing their coal from Pennsylvania over the Canadian Pacific Railway, the freight charge being \$5.23 per ton. The delivery was made over a trestle in the yard of the plaintiff company's railway. An agent of the plaintiff company, desirous of securing this business for it, canvassed the defendants, who said that they would transfer the business to the plaintiff company if the freight charge would be the same. The agent stated that the rate was the same, and the transfer was made. The defendants received their coal over the plaintiff company's line on the faith of this understanding, were billed for the freight at the stipulated rate, paid their bills, and sold their coal at a price based upon this freight charge. Afterwards, the plaintiff company, alleging that it had discovered that the rate it was entitled to charge, under tariffs duly filed, was \$6.43 per ton, billed the defendants for the difference, approximately \$4,500; and, payment being refused, this action was brought to recover the difference, viz., \$4,495.53.

The action was tried before McEvoy, J., without a jury, at Ottawa, and he gave judgment for the plaintiff company for \$299.72 only and without costs.

The plaintiff company appealed from the judgment of McEvoy, J.

October 29 and 30. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and ORDE, JJ.A.

W. L. Scott, K.C., for the appellant company, argued that the learned Judge below should have found the amount due for freight charges to be \$6.43 per gross ton, and not \$5.31 as found, or \$4,495.53 in all. It was unlawful for the appellant company to carry the coal at so low a rate as \$5.31, or anything less than

\$6.43, having regard to the tariffs filed, and the defendants were bound by law to pay according to the tariff rates, and could not free themselves from such obligation by any contract. Even if, after complete performance of such a contract, it was found that the tolls charged were less than the tariff tolls, the appellant company was bound under the Railway Act to collect the deficiency, and the defendants were obliged to pay the deficiency. Reference to the Railway Act, R.S.C. 1927, ch. 170, secs. 5, 12, 314, 319, 322, 323, 341, 355, 316, 431; *Canadian Condensing Co. v. Canadian Pacific Railway Co.* (1911), 12 Can. Ry. Cas. 1; *Watson v. Canadian Pacific Railway Co.* (1914), 32 O.L.R. 137; *Pere Marquette Railway Co. v. Mueller Manufacturing Co. Ltd.* (1919), 45 O.L.R. 312; *Canadian Pacific Railway Co. v. Gingras* (1925), 33 Can. Ry. Cas. 61; *Louisville and Nashville Railroad Co. v. Maxwell* (1915), 237 U.S. 94; *Illinois Central Railroad Co. v. Henderson Elevator Co.* (1913), 226 U.S. 441; *Louisville and Nashville Railroad Co. v. Central Iron and Coal Co.* (1924), 265 U.S. 59; *Pittsburgh Cincinnati Chicago and St. Louis Railway Co. v. Fink* (1919), 250 U.S. 577; *Foley v. Chicago Great Western R. Co.* (1928), 217 N.W. Repr. 563. The appellant company had a lien for the proper amount. It was by mistake that the smaller sum was charged.

*Shirley Denison*, K.C., and *W. F. Schroeder*, for the defendants, respondents, contended that, there being no bill of lading, the Bills of Lading Act, R.S.C. 1927, ch. 17, did not apply, and consequently there was no obligation on the respondents, the consignees, to pay freight. If there were any liability it would be upon the consignors. There was no provision in terms in the Railway Act requiring the railway company to sue to recover these charges. If there was any mistake, the respondents were not parties to it. The railway company could not take advantage of its own wrong, and there was no legislation which sanctioned such a proceeding. Reference to the Railway Act, R.S.C. 1927, ch. 170, secs. 214, 316, 317, 323, 328, 330, 425, 429, 430; and to Halsbury's Laws of England, vol. 26, para. 404; *Brandt v. Liverpool Brazil and River Plate Steam Navigation Co. Ltd.*, [1924] 1 K.B. 575; *Lees v. Ottawa and New York Railway Co.* (1900), 31 O.R. 567; *Rodger v. Minudie Coal Co.* (1907), 4 Eastern L.R. 255.

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December 21. LATCHFORD, C.J.:—This is an appeal from the judgment of McEvoy, J., delivered on the 24th July, 1928, after trial without a jury at Ottawa on the 30th May, 1928.



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There is little or no material fact in dispute. In May, 1923, the defendant company contracted with the Ogdensburg Coal and Towing Company to purchase Scranton coal delivered f.o.b. Ottawa, at \$14.08 per gross ton. The freight was payable by the vendors, but as a matter of convenience it was the practice for the defendants to pay the freight weekly at Ottawa to the carrier and to charge what was so paid against the vendors on settlements made on the 10th of each month.

The coal trestle of the defendant company was in the yard of the plaintiff company.

During May, 1922, about 25 car-loads of coal reached Ottawa from some point at or near the border over a line of the Canadian Pacific Railway. The freight charge against the coal was \$5.23 per gross ton. The agent of the plaintiff company at Ottawa was naturally desirous that the coal should be routed over the line of his company, and officers of the defendant company, on being assured that the rate would be the same as over the Canadian Pacific Railway, were willing to have the coal so brought to Ottawa.

On the 15th June, 1923, the defendant company wrote to the Ogdensburg Coal and Towing Company:—

“As our trestle is on the New York Central . . . we thought if it were at all possible we would prefer to have the coal come by New York Central instead of C.P.R., as we like to give the New York Central as much freight as possible. We would appreciate your kindness if this matter could be arranged, at the same time the coal carrying the same freight rate as if it came via C.P.R.”

The vendors of the coal answered by telegram on the 15th June that they had “requested Rouse’s Point to route all coal via N.Y.C. on future shipments.”

Between June, 1923, and January, 1924, 86 cars of coal arrived at Ottawa over the plaintiff company’s lines for delivery to the defendants. In every case the coal was consigned to the Ogdensburg Coal and Towing Company, Mile End, Montreal, but was reconsigned by that company, while the cars were rolling, to the defendants at Ottawa, via Rouse’s Point.

No bill of lading accompanied any car of coal received by the defendants. Hence the Bills of Lading Act, R.S.C. 1906, ch. 118, now R.S.C. 1927, ch. 17, has no application.

In January, 1924, officers of the plaintiff company discovered that the freight charge over the route followed, according to what is called “a special joint tariff for coal,” should have been



\$6.43. In September, 1926, action was brought for \$4,495.53 or for \$1.20 per ton—the difference between \$5.23 and \$6.43—on the 86 cars of coal delivered to the defendants. By another route which might have been followed, the so-called tariff charge would have been \$5.31 or 8 cents per ton in excess of the charge actually collected. According to the judgment, the plaintiff company had the right to recover from the defendants on the basis that \$5.31 should have been paid.

Any liability that may have existed was clearly that of the consignors.

In the circumstances, I am firmly of opinion that no foundation existed for the action against the defendants. It should, I think, have been wholly dismissed.

But, as no cross-appeal has been entered against the \$299.72 awarded—probably because the amount is small when compared with the claim—the judgment to that extent must stand. I cannot, however, refrain from expressing the hope that a great corporation like the New York Central will not exact from the defendants a sum to not one cent of which it is properly entitled.

The appeal should be dismissed with costs.

RIDDELL, J.A.:—The claim is in substance that the plaintiff company had collected too little freight on coal delivered at Ottawa; and, to avoid breaking the law, it sought to compel the defendant company to pay some more.

The plaintiff company had an agent at Ottawa whose business it was to obtain business for it; he, in the course of that business, called on the defendants, who were using considerable coal, and, of course, he tried to get their business for his company. This was a wholly proper transaction and in the regular line of his duty to the plaintiff company. The defendants had no objection to transferring their business in that regard to the plaintiff company, but the Canadian Pacific Railway Company, another company having a line running into Ottawa, had given satisfactory service at a satisfactory price: consequently, the defendants said that they were satisfied to transfer the business to the plaintiff company if it did not cost any more money; the agent “presumed we had the same rates into Ottawa as the C.P.R.,” and it seems reasonably clear that he agreed to deliver at the same rate as the “C.P.R.” For a considerable time coal was delivered to the defendants at the rate of \$5.23 as the “C.P.R.” had done. Apparently the coal was deliverable to the defendants free, and for convenience the defendants paid the freight and charged the con-

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signors. Recently, an officer of the plaintiff company found that the amount being charged was less than the amount chargeable by the tariffs filed with the Railway Commissioners, and the balance was demanded; on refusal, this action was brought. The learned trial Judge found that \$5.31 should have been collected, and gave judgment for the trifling balance. There is no appeal as to this small sum; but the plaintiff company appeals, claiming that \$6 odd was chargeable and is collectable, placing its reason for bringing action on a strong desire to obey the law of Canada.

It will not, I think, be necessary to consider whether there is any legal obligation to bring this action; I think that the action is not well-founded.

Admittedly, there were no bills of lading; consequently, the Bills of Lading Act, R.S.C. 1927, ch. 17, does not apply, and we are left as at the Common Law, except as modified, if at all, by other legislation. There was at the Common Law no obligation on the consignee to pay the freight to a common carrier, in the absence of special circumstances; the law is correctly laid down in the case in the Supreme Court of the United States pressed on us as supporting the plaintiff company's claim in another view. In *Louisville and Nashville Railroad Co. v. Central Iron and Coal Co.*, 265 U.S. 59, at p. 67, it is said:—

“Ordinarily, the person from whom the goods are received for shipment assumes the obligation to pay the freight charges; and his obligation is ordinarily a primary one. This is true even where the bill of lading contains, as here, a provision imposing liability upon the consignee. For the shipper is presumably the consignor; the transportation ordered by him is presumably on his own behalf; and a promise by him to pay therefor is inferred (that is, implied in fact), as a promise to pay for goods is implied, when one orders them from a dealer.”

There being, in the absence of some other element, no obligation on the defendants to pay freight at all, what took place that laid it under such an obligation? Surely, at the very highest, only the agreement to pay to the plaintiff company for delivering the coal as much as had been paid to the Canadian Pacific Railway Company. That amount was paid, and I can find no obligation to pay more. The agreement, if there was such, was not to pay the freight but to pay a certain amount.

It is said that this bargain was a breach of the law; if so, it was not binding, and there was no contract to pay at all. If it was legal, *cadit questio*.

It is argued that the plaintiff company had a lien for the proper amount; and that, by mistake, the goods were delivered up for a smaller sum; but there was no mistake as to the circumstances; and, if the plaintiff had a mind to let the goods go on payment of a less sum, there arose no obligation on the receiver to pay any more.

Much was said as to the illegality of taking the agreed sum for the routing which was actually followed; but there was no illegality in charging the smaller sum if the proper routing which was open to the railways had been arranged. That this routing, which would have met all requirements of the law, was not followed, was no fault of the defendants.

There are other difficulties in the plaintiff company's way; but the above is sufficient to dispose of the case adversely to the appellant company. I may be allowed to say that a more unrighteous and unconscionable claim I have never seen; and I am glad that the statute law does not compel us to give effect to it.

The appeal should be dismissed with costs.

Of course, if the plaintiff company finds itself under a legal or conscientious duty to collect some more money for transporting this coal, nothing we say will prevent it suing any one it may think should pay, including the person primarily liable, the consignor.

MIDDLETON, J.A. (after briefly stating the facts as above):—The mistake, if there was a mistake, was in no way induced or contributed to by the defendants. Had it not been for the statement that the rate to be charged was the same as that being charged by the Canadian Pacific the defendants would not have transferred their business, and would have received their coal, at the freight rate stipulated, from the Canadian Pacific Railway. The dishonesty of the claim now put forward is apparent, and the attempt to justify the plaintiff company's conduct upon the grounds of public policy savours of hypocrisy. If the plaintiff company were guilty of violation of the law, as its counsel says, in charging less than the tariff rate, I hope that those responsible for the enforcement of the law will exact the utmost penalty, but this cannot be a foundation for this action, in which the plaintiff company alleges as its justification its own misconduct while seeking to gain profit for itself.

There is an extraordinary difference of opinion among my brethren as to the precise ground upon which the dismissal of the action should be based. I am willing to adopt the language

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of one of the Judges of the Supreme Court under similar circumstances and to say that I am content to dismiss the action and this appeal upon any ground rather than to yield to the contentions of the appellant company.

ORDE, J.A.:—This appeal must be dismissed upon what seems to me a very simple ground.

The action is really an extraordinary one. As the result of the solicitation of an agent of the plaintiff company, the defendants caused to be shipped to them over the plaintiff company's and other railway lines, during a period of several months, large quantities of coal, and paid to the plaintiff company from time to time the sums demanded as the freight charges for the services so rendered, those charges being at the rates which the plaintiff company's agent had represented would be charged when the business was solicited on behalf of the plaintiff company. Now, notwithstanding that the services so agreed upon between the defendants and the plaintiff company's agent have been completely performed and the stipulated price therefor has been fully paid to the plaintiff company, the plaintiff company claims to recover certain further sums for the services so performed, upon the ground that it was unlawful for a railway company to carry the coal at so low a rate and that the defendants are bound by law, notwithstanding any bargain to the contrary, to pay according to the tariff rates.

Whether or not there was any real contractual relationship between the defendants and the railway company may be open to question. If the plaintiff's right to recover is based on contract, it is clear that the only foundation for it was the arrangement between the plaintiff company's agent and the defendants. The real bargain as to each shipment involved would appear to have been with the Ogdensburg Coal and Towing Company, the vendors and consignors of the coal to the defendants, who acted upon the defendants' instructions that the coal should reach the defendants over the plaintiff company's railway.

Whatever may be the true position as to any initial obligation to pay the tolls for the coal delivered to the defendants, the plaintiff company's claim to recover for the alleged deficiency is based solely on the provisions of the Railway Act of Canada, R.S.C. 1927, ch. 170; but, among the numerous sections referred to by counsel for the plaintiff company in support of his contention that the Act entitles it to recover, there is none which either expressly,



or so far as I can see by implication, creates any such liability upon the part of a consignee of goods.

The sections mainly relied upon were 314 and 355. Section 314 provides for equality of tolls, and prohibits discrimination by way of any reduction or advance thereof in favour of or against any particular person. This section, and those which immediately follow it, are chiefly for the regulation and control of railway companies in their relationship to the public and to each other. Section 355, which provides that in case of the refusal or neglect to levy any lawful tolls the same may be recovered in any court of competent jurisdiction, is the type of section to be found in statutes regulating public or quasi-public bodies upon whom power to collect tolls is conferred in order to make it clear that, in addition to the remedy by seizure and sale or to any penalties that may be incurred, a civil right of action to recover as a debt is given. To say that this section entitles a railway company to recover tolls at one rate in the face of a contract at another, or where the rate demanded and paid is the rate given before the service has been performed, is giving it a construction that it will not bear and which could not have been intended by Parliament.

Nowhere in the Act is there a suggestion of any right, as between a railway company and individuals who have paid upon the footing of a contract and in good faith what the railway company has demanded for its services and after the services have been performed, to demand and collect some further remuneration because an ostensible agent for the company either had no authority to make the bargain or had made a mistake in quoting the rate as the basis thereof.

Mr. Scott's argument, based upon the inviolability of the tolls fixed by the tariffs as approved by the Board of Railway Commissioners, went this length: that not only is no contract which departs from such tolls binding upon a railway company (which may, perhaps, be sound if one were seeking to enforce a contract still unperformed on either side), but that, after complete performance of the contract according to its terms, if it be discovered that the tolls so charged were less than those fixed by the tariff, the railway company is both bound and entitled under the Railway Act to collect the deficiency, and the shipper or passenger is bound by law to make it good. This would mean, for example, and Mr. Scott frankly stated that his contention went that far, that if it were discovered that the passenger tickets issued between say Toronto and Ottawa, for some years past, had by some error been issued at too low a rate according to the tariff, the railway

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company could recover as a debt due from every one of the thousands of passengers who had unwittingly paid the price demanded of them, the difference between the amount so paid and what the company ought to have charged according to the proper tariff. Unless some such liability is expressly imposed by statute, it is inconceivable that it can be implied from those provisions of the Railway Act relied upon by the railway company. The Act provides many drastic penalties for failure to observe its directions and inhibitions, but it is impossible, in my judgment, to extract from it any right to reopen contracts which have been completely performed as have those in question here.

There may, of course, be cases involving fraud where a railway agent and a shipper dishonestly conspire to deprive the railway company of its just tolls. Such cases would be disposed of upon an entirely different footing. And there may be cases where nothing is said as to tolls, which would by implication create a liability to pay the tariff rates. Possibly in such cases payment upon the footing of an erroneous account rendered for the tolls might not be an answer to a further demand for the balance of the sum really due according to the contract.

Here no such element appears in the transactions, and in my opinion it is too late to reopen them.

Among the numerous cases cited by Mr. Scott there was none binding upon us which touched the point in question here.

I can see no occasion for dealing with the elaborate arguments presented to us as to what tariffs were in force and whether or not the tariffs were joint tariffs within the meaning of the Railway Act. In my view they have nothing to do with the issue here. It is immaterial, I think, what the tariffs were or what the consequences may be to the railway company because of the failure of its officers to abide by them. In the circumstances this was no concern of the defendants whatever.

I agree that the appeal should be dismissed.

*Appeal dismissed.*

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## [APPELLATE DIVISION.]

O'BRIEN v. McCOIG.

1928.

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*Mechanics' Liens—Mortgage—Priority—Mechanics' Lien Act, R.S.O. 1927, ch. 173, secs. 5, 7 (3), 13 (1)—Extent of Priority—Determination, according to Time when First Lien Arose—Increase in Selling Value of Land.*

The effect of secs. 7(3) and 13 (1) of the Mechanics' Lien Act, R.S.O. 1927, ch. 173, is to give priority to the claim of a mortgagee where the mortgage exists in fact before the lien arises, to the extent of the actual value of the land at the time the first lien arose.

Where there is a mortgage which is a security not only for money then actually advanced but for money to be advanced, that mortgage has priority with respect to all advances unless and until there is notice in writing to the mortgagee of the lien or the lien is registered under the provisions of the Mechanics' Lien Act.

*Pierce v. Canada Permanent Loan and Savings Co.* (1894-5), 24 O.R. 426, 25 O.R. 671, 23 A.R. 516, considered.

Section 73 of the Registry Act, R.S.O. 1927, ch. 155, and sec. 13 (1) of the Mechanics' Lien Act, made it plain that the appellant's mortgage, in the circumstances of this case, had priority over the liens.

But the priority is to the extent only of "the actual value of the land and premises at the time the first lien arose;" sec. 7 (3), *supra*; and a lien arises when the actual work is done or the material supplied: sec. 5.

The plaintiff O'B.'s lien arose when he supplied material under contract, but his lien ceased to exist by reason of his failure to register his claim in time. The plaintiff H.'s lien arose only when he commenced his work, and all O'B.'s material was upon the ground before H. began:—

*Held*, that H.'s lien, for the purpose of this litigation, was the first lien, and the value of the land should be ascertained at the date when he began his work—the mortgagee was entitled to priority as of that date, that is, after O'B.'s material had been supplied, and the amount by which the selling value of the land was thus increased must be ascertained.

AN appeal by the defendant the Agricultural Development Board from the judgment of the Judge of the County Court of the County of Kent, in an action for the enforcement of mechanics' liens, declaring the appellant entitled as mortgagee to priority over the liens, but only to the extent of \$11,000, part of the mortgage-debt.

November 27. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and ORDE, JJ.A.

H. W. Timmins, for the appellant, argued that the learned trial Judge was wrong in finding as a matter of law that the mortgage of the appellant was entitled to priority over the liens filed only to the extent of \$11,000; that he proceeded upon a

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wrong principle in determining the actual value of the land at the time the first lien arose; and that he should have found that the appellant's mortgage was entitled to priority over all liens filed, to the full amount advanced upon the mortgage, as a subsequent mortgage within the meaning of the Mechanics' Lien Act, the appellant not having received notice of the lien, as required by the Act, and by virtue of the Registry Act, R.S.O. 1914, ch. 124, secs. 71, 72, 73, and 74. Reference to *Warwick v. Sheppard* (1917), 39 O.L.R. 99, 103; *Charters v. McCracken* (1916), 36 O.L.R. 260; *Martello v. Barnet* (1925), 57 O.L.R. 670; *Gooding v. Crocker* (1926), 60 O.L.R. 60; *Pierce v. Canada Permanent Loan and Savings Co.* (1894-5), 24 O.R. 426, 25 O.R. 671, 23 A.R. 516; *Gauthier v. Larose* (1901), 38 C.L.J. 156.

*Lyle Ramsey*, for the lienholders, respondents, contended that the appellant's mortgage was a prior mortgage under the Mechanics' Lien Act, and so had priority over lienholders to the amount of the value of the land when the first lien arose, which value was \$11,000, as found by the learned trial Judge.

December 21. The judgment of the Court was read by MIDDLETON, J.A.:—The difficulty arises with respect to the erection of a tobacco barn upon the farm of the late Senator McCoig. The facts seem to be free from dispute. On the 1st June, 1927, a mortgage was made by the late Senator to the Agricultural Development Board to secure the sum of \$12,000. Of this \$11,012.03 was advanced before the 15th July, 1927, and the balance, \$987.97, was advanced on the 22nd July, 1927.

The two liens claimed in this action are: (1) a claim by O'Brien for \$1,100 for material supplied under contract, less the sum of \$500 paid on account—\$600—and a small further sum, \$217.40, claimed for extra supply at a later date. The contract material was supplied on the 14th August. The other material outside the contract was supplied at a later date. The lien with respect to the \$600 has been disallowed because it was not filed in time. The lien for extras has been reduced to \$112.40 because part of the material for which the lien was claimed was not supplied for the purpose of going into the building. The \$112 lien is for material supplied at a later date than the lien claimed by Higgins.

Higgins's claim is for \$400, the contract price for the erection of the barn, less \$200 paid on account—\$200. This work began about the 19th August and was substantially completed shortly thereafter, and its validity is not questioned.



For the purpose of determining the priority of the mortgages, having regard to the provisions of the Mechanics' Lien Act, R.S.O. 1927, ch. 173, the learned Judge has assumed that the critical date was the 20th July, 1927, stating that this was admitted by counsel for him to be the important date, and he has found the value of the land as of that date to be \$11,000, although it was valued upon the application for the loan at \$24,000.

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The statutory provisions dealing with the property are secs. 7(3) and 13(1). Section 7(3) provides: "Where the land and premises upon or in respect of which any work or service is performed or materials are furnished to be used, is encumbered by a prior mortgage or other charge existing in fact before any lien arises, such mortgage or other charge shall have priority over all liens under this Act to the extent of the actual value of such land and premises at the time the first lien arose . . . ." And sec. 13(1): "The lien shall have priority over all judgments . . . and over all payments or advances made on account of any conveyance or mortgage after notice in writing of such lien to the person making such payments or after registration of a claim for such lien as hereinafter provided."

The effect of these two sections is to give priority to the claim of a mortgagee where the mortgage exists in fact before the lien arises, to the extent of the actual value of the land at the time the first lien arose. Where there is a mortgage which is a security not only for money then actually advanced but for money to be advanced, that mortgage has priority with respect to all payments or advances unless and until there is notice in writing of the lien to the mortgagee or the lien is registered under the provisions of the Mechanics' Lien Act.

In *Pierce v. Canada Permanent Loan and Savings Co.*, 24 O.R. 426, 25 O.R. 671, and 23 A.R. 516, it was shewn that the great weight of legal authority demonstrates that in the case of a mortgage to secure future advances the subsequent advance relates back to the giving of the mortgage, and the mortgagee's title has relation to the date of the original transaction. A subsequent advance does not amount to the acquisition by the mortgagee of any new interest in the land. When, before the making of a new advance, the mortgagee receives notice of any transaction entered into by the mortgagor or of the existence of any lien or other claim upon his estate, an equity arises by reason of that notice, and a mortgagee who makes an advance, notwithstanding the existence of notice, does not make it in good faith and so is precluded

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from setting up any right with respect to the sum so advanced as against the person of whose claim he has notice.

*Pierce v. Canada Permanent Loan and Savings Co.* was in the first place decided upon another theory by the late Mr. Justice Ferguson, and in appeal to a Divisional Court Mr. Justice Robertson agreed with the judgment in the Court below, so that the decision was one upon which judicial opinion was equally balanced. In the Court of Appeal there was again dissent.

In 1894, while this litigation was pending, "for the purpose of removing doubt" an Act was passed by the Legislature, 57 Vict. ch. 34, sec. 1, which now finds its place in the Registry Act, R.S.O. 1927, ch. 155, sec. 73, which provides that every mortgage shall, as against the mortgagor, and every person claiming under him, be a security to the extent of advances actually made, notwithstanding that the advances were made after the registration of the mortgage, unless the mortgagee shall have actual notice of the execution of a subsequent conveyance, and that the registration of such subsequent document shall not be actual notice. This statute, as well as the provision of the Mechanics' Lien Act, already quoted, which requires written notice, make it plain that the mortgage here is a mortgage having priority over the liens.

This, however, does not solve the question as to the extent of the priority which the statute affords to the prior mortgagee. The wording of both the sections of the Act which I have quoted is that it is the "actual value of the land and premises at the time the first lien arose." A lien arises when the actual work is done or the material supplied: see sec. 5. It is true that a claim for lien may be registered as soon as the contract is made, but the lien itself is based upon the idea that the work done or material supplied actually increases the value of the land. This makes it necessary to inquire carefully as to when the first lien arose. It has been assumed in the Court below that it was on the 20th July. It may be that O'Brien's lien for the lumber supplied under his contract then arose, but that lien, by reason of failure to register within the time required by the statute, had ceased to exist, and, as far as these proceedings are concerned, it is non-existent. Higgins's lien arose only when he commenced his work, and he states that all O'Brien's material was upon the work before he began. Higgins's lien, for the purpose of this litigation, is the first lien, and the value of the land should be ascertained at the date when he began his work. The importance of this is that, in this view, the mortgagee is entitled to priority as of that date, that is, after the \$1,100 of material had been sup-

plied by O'Brien. It may be that the supply of this material actually increased the selling value of the land by the whole \$1,100, or it may be only by a lesser sum. This aspect of the case has not been considered by the learned Judge; and, unless the parties can agree upon the amount by which the selling value of the land was thus increased, there must be a reference back.

As this aspect of the case was not presented before the County Court Judge and not clearly taken as a ground of appeal, there should be no costs of the appeal. If it is necessary that there should be a reference back, the costs will be in the discretion of the Judge, who will deal with them having in mind the attitude of the parties, and he will award costs against the one responsible for the necessity of a reference.

*Appeal allowed.*

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[SUPREME COURT OF CANADA.]

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*Negligence—Motor-vehicles upon Highway—Motor-car Running into Motor-truck at Night—Absence of Tail Light on Truck—Findings of Jury—Negligence Causing the Accident—Judge's Charge—Highway Traffic Act, secs. 9(1) and 41(1), (3)—Misdirection as to Scope and Effect of—Liability of Owner of Motor-truck—New Trial—Questions Proper for Jury—Appeals of Plaintiff with Claims under \$2,000—Jurisdiction of Supreme Court of Canada—Leave to Appeal.*

May 23.  
Dec. 21.

The four plaintiffs sued the defendant company and the defendant H. for damages for injuries sustained upon a highway at night and in the rain, when the motor-car in which the plaintiffs were travelling ran into the motor-truck of the defendant company, driven by the defendant H., the company's servant. The plaintiffs alleged that the injury occurred by reason of the rear lamp of the truck not being lit and the truck not being seen by the plaintiff J., who was driving the plaintiffs' car. The sole ground of liability charged against the defendants was their alleged failure to comply with the requirements of sec. 9, subsec. 1, of the Highway Traffic Act, R.S.O. 1927, ch. 251, as to a rear or tail light. Subsection 3 of sec. 9 provides penalties for violations of the provisions of subsec. 1, and sec. 41 (1) provides that the owner of a motor-vehicle shall be responsible for any violation of the Act. The defendants pleaded negligence on the part of the plaintiffs' driver as the sole or a contributory cause of the collision. At the trial questions were left to the jury. They retired and, after being out some hours, sent to the Judge a memorandum in writing stating that they wished to know whether, if by chance the tail light went out immediately before the accident, the defendant H. would be considered guilty of negligence directly causing the accident, taking into consideration that the light going out would be a matter out of his direct control. The Judge sent for the jury and



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directed them as follows: "Having regard to the fact that this is a civil action, an action for damages based upon the negligence of the defendant H. . . . if you find the circumstances such as you suggest, namely, that the driver was not aware of the light being out because it had gone out suddenly before the impact, then . . . the defendants would not be liable." The jury retired and returned with their verdict. They answered only one of the questions, the first, "Were the defendants guilty of any negligence causing the accident?" Their answer was "No," but they appended a memorandum as follows: "Assuming that the light may have gone out immediately prior to the accident unknown to the driver, we the jury believe the defendant not negligent." After discussion with counsel, and further direction by the Judge to the jury, they brought in another memorandum as follows "We the jury find that the plaintiff was negligent to the extent of not using necessary precautions as demanded by such adverse weather conditions, and was the cause of the accident." Upon these findings, the Judge dismissed the action. An appeal by the plaintiff to the Appellate Division of the Supreme Court of Ontario was dismissed. Upon a further appeal to the Supreme Court of Canada:—

*Held*, that the minds of the jury were so affected by the Judge's direction to them that, although the tail light was out, and its being extinguished was a cause of the collision, the defendants would not be liable "if the driver was not aware of the light being out, because it had gone out suddenly before the impact"—which was tantamount to telling them that the statutory duty under sec. 9 (1) was not absolute but involved civil liability under sec. 41 (1) only if the non-observance of sec. 9 (1) was in some degree attributable to personal fault or negligence of H., and that, unless they found such fault or negligence to be established by the evidence, they should answer the first question in the negative; and that was a misdirection which influenced all their findings.

*Great Western Railway Co. v. Owners of S.S. Mostyn*, [1928] A.C. 57, followed.

There is nothing in the Highway Traffic Act that justifies the restriction of its application to cases in which the person in charge of a motor-vehicle would be responsible at common law. On the contrary, the imposition by sec. 41 (1) of liability on the driver as well as the owner and the provisions of subsec. 3 make it clear that the purpose of the section is not only to impose direct civil liability, but also to make that liability unrestricted, save as explicitly otherwise declared in the section itself.

Upon the crucial questions whether the rear light was burning on the truck and whether it was visible, there was no finding.

The Court directed a new trial in favour of two of the plaintiffs.

The claims of the other two plaintiffs being each for an amount less than \$2,000, the Court was without jurisdiction to entertain an appeal by them.

*Armand v. Carr*, [1926] S.C.R. 575, and *Reynolds v. Canadian Pacific Railway Co.*, [1927] S.C.R. 505, followed.

But leave to appeal was subsequently granted to these two plaintiffs by the Appellate Division, and their appeals were allowed by the Supreme Court of Canada.

*Seemle*, there was no reason why on the new trial the jury should not be asked at the outset: "Did the defendants' motor-truck carry up to the moment of the collision a rear lamp lighted and casting a red light clearly visible at a distance of 200 feet?" And: "If not, did the failure to have such a light cause the collision?"



THIS action was brought by four persons who were injured in a collision between motor-vehicles upon a highway to recover damages for their injuries, they alleging that the collision was caused by the negligence of the defendant Hatch, the driver of the motor-truck of the defendant company.

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The action was tried before ORDE, J.A., and a jury, and upon the answers of the jury to questions left to them judgment was directed to be entered for the defendants dismissing the action.

The plaintiffs appealed from the judgment to a Divisional Court of the Appellate Division.

May 9 and 10. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and GRANT, J.J.A.

*C. W. Plaxton* and *J. O. Plaxton*, for the appellants.

*T. N. Phelan*, K.C., for the defendants, respondents.

May 23. The judgment of the Court was read by HODGINS, J.A.:—This case was tried by Orde, J.A., and a jury. It is a collision case arising out of an accident due to the Hall car, driven by Justin, running into the rear of a truck belonging to the defendant company. This occurred on the 16th November, 1927, at about 6 p.m. on the Centre-road and about 50 yards south of the bridge leading towards Brampton. The weather was, according to Justin, wet, coming down "fairly heavily," and it had been raining all day, but there was a windshield wiper in front of him, which was, as he says, "working perfectly." It was dark when the plaintiffs left Toronto. W. R. Hall, one of the plaintiffs, is the owner of the car, and the other occupants were passengers. All join in the action. The defendant Hatch was the driver of the truck.

The plaintiffs assert that the red tail light of the truck was not burning before and at the time of the accident. The defendants contend that it was burning, and that if it had gone out they were not blameable by reason thereof, and also that the driver, Justin, was negligent in not looking out with sufficient care and was driving too fast.

The difficulty appears to have arisen from the jury following up a suggestion of the learned trial Judge rather too literally, and not being explicit enough, leaving an atmosphere of doubt which it is necessary to solve. But, after a very full argument, and giving the points raised therein careful consideration, I am

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convinced that if the answers are regarded in the light of the charge to the jury and the instructions given to them, enough light is thrown on what are, at first sight, difficulties, to enable the Court to arrive at a proper conclusion.

The questions and answers giving rise to the discussion before us, and what occurred at the trial regarding them, I shall deal with separately.

The jury at first answered one question as follows:—

“1. Q. Were the defendants guilty of any negligence causing the accident? A. No.”

The learned trial Judge on receiving this answer found a paper attached, and said:—

“The jury have attached to the answer this slip: ‘Assuming that the light may have gone out immediately prior to the accident, unknown to the driver, we the jury believe the defendant not negligent.’”

He then asked the jury:—

“Am I to understand, gentlemen, that it is your conclusion from the evidence that the light did go out immediately before the accident, and that you so find?”

“The Foreman: We do not know, sir.”

“His Lordship: Gentlemen of the jury, are you prepared to make a finding upon that question as to whether or not the plaintiff Justin was guilty of negligence causing the accident? In other words, is your answer ‘No’ to question No. 1 based upon this assumption which you have attached to the answer, and that only? Is that right?”

The Foreman: (No answer).

His Lordship: That is, you find that the defendants were not negligent because of that assumption that the light may have gone out immediately before the accident? Am I correct in that?

The Foreman: (No answer).

His Lordship: I think the slip may be regarded as their conclusion that upon that ground and that alone they find for the defendants.”

In order to understand exactly this answer, the language of the charge and a request by the jury, before they brought in their answer to Q. 1, must be set out. The portions of the charge, so far as it deals with this point, are as follows:—

“In a case like this, the parties are in exactly the same position as if the alleged negligence had nothing to do with motor-vehicles at all, and the burden of establishing that the defendants

were guilty of negligence rests with the plaintiffs. They must establish to your satisfaction that the injuries which they sustained resulted from some neglect of duty or some failure to comply with the law, which is practically the same thing, before they can recover. You have no right to guess at what happened."

"So far as this trial is concerned, the only negligence which is imputed to these defendants and the only negligence which the plaintiffs must prove in order to succeed at all, is that there was no light shining, no visible light, on the rear of the truck when the accident happened and immediately before it happened.

"If the plaintiffs cannot prove and have not proved that allegation, then the action fails; it may fail on other grounds, but it certainly fails on that ground, if they have not succeeded in proving that there was no visible light on this truck on this occasion."

"If, as has been pointed out, the tail light of the defendant Hatch's truck was lighted and visible, that puts an end to the action if that is your conclusion, and you should answer that first question 'No.' You might, however, come to the conclusion, and quite properly, having regard to all the circumstances—if you do conclude upon the evidence that that is the fact — that, though the tail light was not burning, the real cause of this accident was either excessive speed or failure to keep a proper lookout on the part of Justin, the driver of the plaintiff Hall's car in which the four plaintiffs were riding. Either of those conclusions will be sufficient justification for answering that question 'No.'"

There was evidence that the Corketts, husband and wife, had seen a truck which appeared to resemble the one in question on which the head lights were flickering and without a tail light lit, and the jury were asked to find if this was the defendants' truck. As against this there was evidence given by five men, referred to below, who saw the tail light on the defendants' truck burning. The learned Judge commented upon the evidence of all these witnesses and directed attention to certain discrepancies, etc.

He then proceeded:—

"There is evidence which, if believed, would indicate that the tail light was burning at the rear of that truck at the time those men observed it. It is for you to determine whether or not, having regard to the statements of Justin, Hall, and Mrs. and Mr. Corkett, as against these other statements, the tail light was actually burning at the moment or immediately before the moment of impact."

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After retiring, the jury sent in a written question to the trial Judge in the following words:—

“The jury wish to know if by chance the tail light in question was to go out immediately prior to the accident would the defendant be considered guilty of negligence directly causing the accident, taking into consideration that the light by going out would be a matter out of his direct control?”

To this the learned Judge replied as follows:—

“The question, at all events, lends colour to this idea, that you are of the opinion that the evidence might establish that the tail light was in fact lit up until a very short time before the impact, but that it had gone out immediately before that, and therefore it would be quite true that the light had not been seen by the plaintiffs and also quite true that the light was burning as sworn to by the defendants’ witnesses shortly before the accident, and in that way there would be a reconciliation of the two statements. I understand your question to amount to this, that, having that in mind, and the light having gone out without the knowledge of the driver, under those circumstances would the driver be guilty of negligence directly causing the accident?”

His answer is given in the following words:—

“If you find the circumstances such as you suggest, namely, that the driver was not aware of the light being out because it had gone out suddenly before the impact, then, in my judgment, the defendants would not be liable. I say I may be wrong as to that, and because of that I am going to ask you, if that is your conclusion, to make it perfectly plain in the answer to the question. It may be necessary for you to amplify your answer by adding a note at the foot of your answer, to the effect that you come to the conclusion as a fact and find it to be the fact that the light was burning up until shortly before the accident, and had gone out immediately before the accident, and that therefore the defendant driver was not aware of it.

“I think the simplest way would be to attach a memorandum at the foot of the answer, to the effect that you find as a fact certain things upon which you base the conclusion at which you arrive.”

When these matters are carefully considered and the situation analysed, I draw the conclusion that after the Judge’s charge the jury were puzzled to know whether, if they believed the evidence of those called by the defence, whose evidence had been alluded to by the learned Judge, as against that for the plaintiffs, already mentioned, but that the light had gone out without Hatch’s



knowledge just before the accident, they were bound to find the defendants guilty of negligence. Hence their question.

After being told by the learned Judge that in his view the defendants would not be culpable, they were sent back with a request or direction from him that, as he might be wrong, he would like them to add a note at the foot of their answer to question 1 stating whether they found as a fact that the light had gone out just before the impact. This request was not exactly complied with, but there is a definite finding in the answer to question 1 that the defendants were not guilty of negligence "causing the accident." This, when coupled with the rider, must mean that the jury were satisfied that the light was lit until shortly before the smash, and that, even assuming that the light may have gone out just before the accident, no negligence causing it to do so was shewn for which the defendants were chargeable. I think, therefore, the answer to question 1 is clear and conclusive on the point.

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I now turn to the only other answers given by the jury, which fortify the conclusion at which I have arrived with regard to question number 1, namely, the answer to questions 3 and 4. These were: (3) whether the plaintiff Justin was guilty of any negligence contributing to the accident; and (4) what was his negligence?

The jury's reply to this, heading their finding, "Memo. No. 2," is as follows:—

"We the jury find the plaintiff was negligent to the extent of not using necessary precautions as demanded by such adverse conditions *and was the cause of the accident.*"

The words underlined were added by the jury afterwards, as will be shewn.

On this point the learned Judge had said in his charge:—

"The defendants set up other defences besides the denial of the allegation that the light was not burning or visible. They say the accident was wholly caused by the negligence of the plaintiff Justin, and that the negligence consisted of two different things, namely, driving at an excessive speed having regard to the conditions that night, and also that he was not keeping a proper look-out, again having regard to the murky condition of the atmosphere and the fact that it had been or was raining.

"If you come to the conclusion from the evidence that those allegations are sustained and proven, and that the plaintiff Justin was driving at an excessive rate of speed or failed to keep a proper look-out, and that, notwithstanding any negligence on the part

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of the defendants, notwithstanding that the tail light was out, the sole cause of the accident was one or the other or both of those species of negligence on the part of the plaintiff Justin, then again you would answer the first question 'No,' because the negligence of the defendants as to the tail light being out would not be the cause of the accident."

"You might find, however, that the defendants were guilty of negligence because of the failure to have the tail light burning, and that the plaintiff Justin was not guilty of such a degree of negligence as to be solely responsible for the accident; in other words, that there was a degree of negligence on both sides both of which contributed to and both of which caused the accident, each combining with the other to cause it. In that case you will answer the third question, 'Was the plaintiff Justin guilty of any negligence contributing to the accident?' by saying 'Yes' if that is your conclusion.

"Then in answer to the fourth question, 'If so, what was his negligence?' you could say: 'In not keeping a proper look-out,' or 'In driving at an excessive rate of speed, having regard to the circumstances,' if you so concluded."

The learned trial Judge, before the jury retired, made a further remark to them, after some discussion with counsel, as follows:—

"You all understand, gentlemen, that it is the duty of a man driving a motor-car at night to keep the car within sufficient control to be able to stop within the distance he can see with his head lights. There was some discrepancy in the evidence of these two men" (Hastings, an automotive engineer, called by the plaintiffs, and Justin), "for one said 75 feet and the other said 200 feet.

"Mr. Phelan: 20 to 25 feet, according to Justin's evidence, was the limit of distance he could see ahead of him.

"His Lordship: That night?

"Mr. Phelan: Yes, my Lord.

"Mr. Bell: No, he did not say that. As a matter of fact, it ran all the way up to 400 feet.

"Mr. Phelan: I am speaking of Mr. Justin's evidence.

"His Lordship: Do you say that Mr. Justin said that?

"Mr. Phelan: Yes, my Lord.

"His Lordship: According to my note he said: 'If I had to depend on my head lights only I could see an unlighted object about 50 feet away.' Then he said his lights did not reveal this particular truck until it was 20 to 25 feet away.

"Mr. Phelan: Yes, my Lord; this particular truck.

"His Lordship: But he said if he had to depend on his head lights only he could have seen an unlighted object about 50 to 60 feet away, depending on where it was; in some places he could see a dark object 70 feet away."

The learned Judge, after the jury had brought in their answers to question 1, was asked by counsel for the defendants to ascertain from the jury whether they had dealt with the suggested negligence of Justin already alluded to in the charge. The learned Judge then asked the jury if they could add, "in view of the situation created by the assumption" stated in respect to question 1, "a further statement to the effect, 'We find the accident was caused solely by the negligence of the plaintiff driver,' or 'We find that the plaintiff driver was not guilty of any negligence causing the accident?'"

The jury, having retired, returned to the court-room at 10.45 o'clock p.m.

"His Lordship: The memorandum reads: 'We the jury find that the plaintiff was negligent to the extent of not using necessary precautions as demanded by such adverse weather conditions.'"

The trial Judge then interrogated the jury:—

"His Lordship: Gentlemen of the jury, can you say that that was the cause of the accident? If that is what you conclude, you can add some words to the effect that the plaintiff Justin's negligence was the cause of the accident.

"The Foreman: By that memorandum I think that is what we inferred.

"His Lordship: If that is what you believe, just go back to your room once more and add those words, or words to that effect—I do not desire to suggest what words should be employed but words to express what you really find. Just continue the sentence to that effect.

Whereupon the jury again retired and returned to the court-room at 10.51 o'clock p.m.

"His Lordship: Your memorandum now reads: 'We the jury find that the plaintiff was negligent to the extent of not using necessary precautions as demanded by such adverse weather conditions, and was the cause of the accident.'"

This seems to me, as I have already indicated, to make it quite certain that the jury meant to absolve the defendant from any negligent act and to find that the accident was due solely to Justin's neglect to look ahead in proper time and to his excessive speed.

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The only point remaining which was argued before us was, as put forward by the plaintiffs, that, as the Highway Traffic Act provides that every motor-vehicle on the highway after dusk shall carry a lamp on the back of the vehicle which shall cast from its face a red light only, clearly visible at a distance of at least 200 feet, the defendant Hatch, if his light was out even immediately before the accident, violated the statute, and the owner was responsible for such violation. The difficulty here is that the plaintiffs did not succeed in getting any finding that the red light was not carried or was not burning and visible at a distance of 200 feet. Such a finding is necessary to establish the fact that the Act has been violated, and the jury have failed to make any such finding. Consequently the argument fails.

It might be well to add that much of the difficulty in the present case would have been avoided had the jury been required to answer all the questions which were material on the face of the paper containing the questions instead of the practice pursued in this case. Vagueness in the answers of the jury invariably causes a great deal of trouble, because, unless the jury's ideas of what are the acts or omissions which constitute negligence are set out in plain language, the Court is unable in most cases to decide whether or not what is suggested is really negligence in law or involves the conclusion that there has been a breach of duty owed to others.

I think this appeal fails and the action and appeal should be dismissed, both with costs.

The plaintiffs appealed to the Supreme Court of Canada from the judgment of the Appellate Division.

November 26 and 27. The appeal was heard by ANGLIN, C.J.C., and MIGNAULT, NEWCOMBE, LAMONT, and SMITH, JJ.

*D. L. McCarthy*, K.C., and *C. W. Plaxton*, K.C., for the appellants.

*Phelan*, K.C., for the defendants, respondents.

December 21. The judgment of the Court was read by ANGLIN, C.J.C.:—As we have come to the conclusion that there must be a new trial in this action, following our usual practice we shall discuss the facts only so far as is necessary to make clear the ground of our decision and as may be desirable to avoid further difficulty arising from the same cause.

The sole ground of liability now charged against the defendants is their alleged failure to comply with the requirements of



sec. 9(1) of the Highway Traffic Act, R.S.O., 1927, ch. 251, as to a rear or tail light.

Section 9(1) reads as follows:—

“9.—(1) Whenever on a highway after dusk and before dawn, every motor-vehicle shall carry three lighted lamps in a conspicuous position, one on each side of the front, which shall cast a white, green or amber coloured light only, and one on the back of the vehicle, which shall cast from its face a red light only, except in the case of a motor-bicycle without a side-car, which shall carry one lamp on the front which shall cast a white light only and one on the back of the vehicle which shall cast from its face a red light only. Any lamp so used shall be clearly visible at a distance of at least two hundred feet.”

“(3) Any person who violates any of the provisions of subsections 1 or 2 shall incur, for the first offence, a penalty of not more than \$5; for the second offence a penalty of not less than \$5 and not more than \$10; and for any subsequent offence a penalty of not less than \$10 and not more than \$25 and in addition, his licence or permit may be suspended for any period not exceeding sixty days.”

This alleged omission, it is claimed, entailed civil liability on the defendants, under subsec. 1 of sec. 41 of the same statute, as owner and driver respectively of the motor-truck. That section reads as follows:—

“41.—(1) The owner of a motor-vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council, unless at the time of such violation the motor-vehicle was in the possession of some person other than the owner or his chauffeur, without the owner's consent, and the driver of a motor-vehicle not being the owner shall be responsible for any such violation.”

The defendants, however, also pleaded negligence on the part of the plaintiffs' driver as the sole cause, or as a contributing cause, of the collision, and gave the following particulars:—

1. The motor-vehicle operated by the said Frank J. Justin was being driven at an excessive speed and was not under proper control.

2. The said Frank J. Justin was a person of defective vision and not competent to operate the said motor-vehicle.

3. It was the duty of the said Frank J. Justin to have turned to the left as far as may have been necessary to avoid a collision with any vehicles on the highway ahead of him, which he had overtaken, and this duty he failed to observe.

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4. It was the duty of the said Frank J. Justin so to operate the motor-vehicle of which he was in charge and so to control the same as to bring it to a stop within the distance that his head lights would reveal an object on the highway ahead of him, and this duty he failed to observe.

5. Even after the danger of a collision with an object on the highway ahead of him became apparent, it was the duty of the said Frank J. Justin to keep such a look-out and have the said motor-vehicle under such control as to bring it to a stop before coming into collision with such object, and this duty he failed to observe.

6. The motor-vehicle being operated by the said Frank J. Justin was being operated contrary to the provisions of the Highway Traffic Act in that it was being operated at a speed or in a manner dangerous to the public.

7. The lights with which the motor-vehicle of the said Frank J. Justin was equipped were defective or insufficient and the brakes with which the speed of the motor-vehicle was controlled were defective or inefficient.

8. If the vision of the said Frank J. Justin of vehicles ahead of him on the highway was obstructed by weather or light conditions, it was his duty to have operated his motor-vehicle at a slow rate of speed and under proper control, and this condition he failed to observe.

They also charged assumption of the risk of the driver's negligence by his co-plaintiffs.

The following questions were submitted to the jury:—

1. Q. Were the defendants guilty of any negligence causing the accident?

2. Q. If so, what was that negligence?

3. Q. Was the plaintiff Justin guilty of any negligence contributing to the accident?

4. Q. If so, what was his negligence?

5. Q. After the plaintiff Justin became aware or ought to have become aware of the impending danger, could he by the exercise of reasonable care have avoided the collision?

6. Q. If so, what could he have done?

7. Q. At what sums do you assess the damages sustained by each of the four plaintiffs, William R. Hall, Annie C. Hall, Alice R. Dale, Frank J. Justin?

8. Q. If you find the defendants and also Justin, both guilty of negligence, in what degree did the negligence of each con-

tribute to the collision: Defendants	per cent.?	Justin	per	S.C. Can.
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The learned trial Judge, in the course of a somewhat lengthy charge, said:—

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“In a case like this, the parties are in exactly the same position as if the alleged negligence had nothing to do with motor-vehicles at all, and the burden of establishing that the defendants were guilty of negligence rests with the plaintiffs. They must establish to your satisfaction that the injuries which they sustained resulted from some neglect of duty or some failure to comply with the law, which is practically the same thing, before they can recover. . . . They must prove, as I have said, that the defendants are guilty of the negligence which is alleged, or they cannot recover. . . . The only negligence which is imputed to these defendants, and the only negligence which the plaintiffs must prove in order to succeed at all, is that there was no light shining, no visible light, on the rear of the truck when the accident happened and immediately before it happened. If the plaintiffs cannot prove and have not proved that allegation, then the action fails. . . . The law requires that every motor-vehicle shall carry three lights, two white lights at the front and one red light at the rear; you need not bother about other requirements, but as to that the law requires that these lights shall be clearly visible at a distance of at least 200 feet. The first thing you have to determine, because it is at the very threshold of this case, is whether or not, upon the evidence of all the witnesses both for the plaintiffs and for the defendants, the rear light was burning on that truck and was visible on that occasion.

. . . “Q. 1. Were the defendants guilty of any negligence causing the accident?

“If, as has been pointed out, the tail light of the defendant Hatch’s truck was lighted and visible, that puts an end to the action, if that is your conclusion and you should answer the first question “No.” You might, however, come to the conclusion, and quite properly, having regard to all the circumstances—if you so conclude upon the evidence that that is the fact—that, though the tail light was not burning, the real cause of this accident was either excessive speed or failure to keep a proper look-out on the part of Justin, the driver of the plaintiff Hall’s car in which the four plaintiffs were riding. Either of those conclusions will be sufficient justification for answering that question ‘No.’ I think it will be wise for you first to deal with that question in those two aspects before proceeding to answer any



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other questions . . . If you come to the conclusion from the evidence . . . that the plaintiff Justin was driving at an excessive rate of speed or failed to keep a proper look-out, and that, notwithstanding any negligence on the part of the defendants, notwithstanding that the tail light was out, the sole cause of the accident was one or the other or both of those species of negligence on the part of the plaintiff Justin, then again you would answer the first question, 'No,' because the negligence of the defendants as to the tail light being out would not be the cause of the accident. A mere breach of duty on the part of one person towards another does not entitle the other to recover damages unless that breach of duty was the cause of the accident . . . You may however come to the conclusion that the defendants were guilty of negligence causing the accident because of their failure to keep the tail light burning. If that is the case, you will answer the first question 'Yes.' Assuming that you have not found, also, that the plaintiff Justin was the sole cause of the accident, you will answer the second question, 'If so, what was the negligence?'

"You will state fully what it was, in your opinion."

After being out for some hours (5.50—8.41 p.m.), the jury sent to the Judge in writing the following memorandum:—

"The jury wish to know if by chance the tail light in question was to go out immediately prior to the accident would the defendant be considered guilty of negligence directly causing the accident, taking into consideration that the light by going out would be a matter out of his direct control."

After some discussion with counsel, the jury was sent for and the learned Judge then said to them:—

"I gather from that question that you may have it in your minds that the evidence establishes two facts: . . . The question, at all events, lends colour to this idea, that you are of the opinion that the evidence might establish that the tail light was in fact lit up until a very short time before the impact, but that it had gone out immediately before that, and therefore it would be quite true that the light had not been seen by the plaintiffs and also quite true that the light was burning, as sworn to by the defendants' witnesses, shortly before the accident, and in that way there would be a reconciliation of the two statements. I understand your question to amount to this, that having that in mind, and the light having gone out without the knowledge of the driver, under those circumstances would the driver be guilty of negligence directly causing the accident? As I have said, that



is not an easy question to answer. I have had the benefit of argument both by Mr. Bell and Mr. Phelan. It is a question which, if I were trying it and had to decide it myself, would probably require several days in order to come to a conclusion. There are a good many aspects of the question which, from a lawyer's point of view, would have to be investigated. There is no time to do that now, and I have to do the best I can to instruct you. What I have to say may prove upon appeal to be utterly wrong, but that cannot be helped—you have to take it for the time-being as being the law. My instruction to you is—I say it with some diffidence—that, having regard to the fact that this is a civil action, an action for damages based upon the negligence of the defendant Hatch, the defendant company's driver, if *you find* the circumstances such as you suggest, namely, *that the driver was not aware of the light being out because it had gone out suddenly before the impact, then, in my judgment, the defendants would not be liable.* I say I may be wrong as to that, and because of that I am going to ask you, if that is your conclusion, to make it perfectly plain in the answer to the question. It may be necessary for you to amplify your answer by adding a note to the foot of your answer, to the effect that you come to the conclusion as a fact and find it to be the fact that the light was burning up until shortly before the accident, and that therefore the defendant driver was not aware of it. Have I made myself clear? Is there anything more you desire to know? . . .

“Now, gentlemen, please do what I have asked. If your conclusions are based upon any such findings, then make that clear. I think the simplest way would be to attach a memorandum at the foot of the answer, to the effect that you find as a fact certain things upon which you base the conclusions at which you arrive. Please retire.”

The report of the trial proceeds:—

“His Lordship: Gentlemen of the jury, have you agreed upon your answers to the questions?

“The Foreman: Yes.

“His Lordship: The jury has answered only one question and that it the first question, ‘Were the defendants guilty of any negligence causing the accident? A. No.’ The jury have attached to the answer this slip: ‘Assuming that the light may have gone out immediately prior to the accident unknown to the driver, we the jury believe the defendant not negligent.’

“Am I to understand, gentlemen, that it is your conclusion

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from the evidence that the light did go out immediately before the accident, and that you so find?

"The Foreman: We do not know, sir."

After some discussion with counsel, the learned Judge further said to the jury:—

"Gentlemen of the jury, are you prepared to make a finding upon that question as to whether or not the plaintiff Justin was guilty of negligence causing the accident? In other words, is your answer 'No' to question 1 based upon this assumption which you have attached to the answer, and that only? Is that right?"

"The Foreman: (No answer)."

"His Lordship: That is, you find that the defendants were not negligent because of the assumption that the light may have gone out immediately before the accident? Am I correct in that?"

"The Foreman: (No answer)."

"His Lordship: I think the slip may be regarded as their conclusion that upon that ground and that alone they find for the defendants."

"Mr. Phelan: In order to avoid the possible necessity for further trial in the matter, I think the jury ought to be asked their opinion on the answer to the first question. The jury have probably assumed that in answering that question as they have answered it, they have done all that is necessary."

"His Lordship: It would have been all that is necessary if they had answered the first question 'No,' without putting this question to me. It might have been assumed that it was one or other of these two grounds, and it would not have mattered, for either would have been sufficient. You suggest now that they should either affirmatively or negatively deal with the other questions?"

"Mr. Phelan: Yes, my Lord."

"His Lordship: Gentlemen of the jury, can you do that without much loss of time? Can you add, in view of the situation created by this assumption of yours, a further statement to the effect: 'We find that the accident was caused *solely* by the negligence of the plaintiff driver,' or 'We find that the plaintiff driver was not guilty of any negligence causing the accident?' Do you think you can do that immediately? I think it is important, because if the law on the question you have answered is settled otherwise than I have assumed to be the law, there might have to be a new trial. You can put your finding on that point on another slip of paper, if you desire to do so: 'We find that the plaintiffs were not guilty of negligence causing the accident,' or 'We

find that the plaintiffs were guilty of negligence causing the accident.' S.C. Can.

"Mr. Plaxton: Is there any doubt about the answer to the first question, my Lord?" 1928.

"His Lordship: In what way? I think their assumption is: 'Assuming that the light may have gone out prior to the accident unknown to the driver, we find the defendant not negligent.'" HALL

"Mr. Plaxton: You are stating that as their assumption, my Lord." v.

"His Lordship: That is their finding, I think." TORONTO-  
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"Mr. Plaxton: As long as that is clear, my Lord." Anglin,  
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Whereupon the jury again retired at 10.28 p.m.

"Mr. Plaxton: My Lord, owing to the absence of senior counsel I am somewhat embarrassed, but on giving this matter further consideration I think the first question should be answered positively. I have in mind a case where there was an answer like this answer made by a jury on an assumption, and the Court of Appeal sent it back for a new trial on the ground that there should have been a positive answer. I think the jury should bring in a positive answer to that question.

"His Lordship: Do not you think it would be better to let sleeping dogs lie? You are in a stronger position before the Court of Appeal on that answer than are the defendants.

"Mr. Plaxton: Supposing the jury find that Justin's negligence is the sole cause of the accident, that puts us in an embarrassing position.

"His Lordship: No; that is a positive finding to that effect, and amplifies or explains the 'No' and eliminates any difficulty that has been raised by this rider.

"Mr. Plaxton: I have in mind, my Lord, the future developments that might arise in this case.

"His Lordship: No doubt it will go to appeal. We will wait and see what the jury have to say.

"Mr. Plaxton: My Lord, I hope that this case does not look like a 'Comedy of Errors,' but after reading over these questions I am going to ask your Lordship to direct the jury to answer all the questions, and particularly question No. 7, dealing with the quantum of damages.

"His Lordship: I have told the jury that if they negative the first question there is no necessity for their answering any of the other questions. If there has to be a new trial, the jury on the new trial will deal with the question of damages.

"Mr. Plaxton: Surely we do not want that, my Lord?"



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"His Lordship: You cannot have a series of findings, some by one jury and some by another. The jury is sometimes directed to find the quantum of damages because the trial Judge thinks there is a lack of evidence to justify the finding and that the plaintiffs should be nonsuited, and in order to avoid the possibility of a new trial on the question of damages, if he is wrong, the jury is requested to assess the damages. But if in this case the jury had simply answered the first question 'No,' and none of the trouble had developed because of the question they put to me, there would have been no necessity for assessing damages in this case, because, if there has been misdirection on my part and a new trial is directed, then all the questions would go back to the new jury. It is only in those cases where a new trial is not necessary that a jury is asked to find the damages, Mr. Plaxton.

"Mr. Plaxton: If we are right in our assumption of the law, namely, that the defendants are liable even though they were not aware of the tail light being out.

"His Lordship: How can you possibly get that question settled except by another jury?

"Mr. Plaxton: If they give a positive answer.

"His Lordship: They give a positive answer, namely, that the defendants were not guilty of negligence causing the accident.

"Mr. Plaxton: Pursuant to a direction from your Lordship.

"His Lordship: If I am wrong in that direction, no higher court is going to find the defendants guilty of negligence upon this or any other evidence; they are going to direct a new trial.

"Mr. Plaxton: I submit not, my Lord. I submit that if the Court of Appeal came to the conclusion that it was the jury's intention to find the defendants negligent, or to find that they would have been negligent, in law, if (with respect) properly directed with regard to the question of the tail light—I have in mind a situation that arose in a case I was in.

"His Lordship: I should be very much surprised to find that a higher Court has ever, where the jury has not found negligence on the part of the defendants, usurped the functions of the jury and found negligence.

"Mr. Plaxton: The point is, that if the jury had been directed that it was in law negligence to have the tail light out, even though the driver did not know it—and that apparently is their idea, having regard to their answer to the first question—and the Court of Appeal said that there had been a misdirection as a matter of law, then they would say, if these other questions were



answered here, that they could deal with the matter without sending it back for a new trial.

"His Lordship: I do not see how. Your right to relief is a finding of such negligence on the part of the defendants, and until you get that you cannot succeed, and that finding must be—as you have chosen to submit the matter by questions to the jury—a finding of the jury; and no higher court will, because the jury has, upon insufficient grounds or upon an untenable ground, as you suggest, found the defendants not negligent, infer from that that because the ground was wrong therefore the jury would have found that they were negligent.

"Mr. Plaxton: I submit it is logical, my Lord.

"His Lordship: I do not agree with you.

"Mr. Plaxton: I press the objections, my Lord.

"His Lordship: In view of that answer I would not ask them to answer the other questions. They are all based upon the theory of a finding of negligence on the part of the defendants."

Whereupon the jury returned to the court-room at 10.45 o'clock p.m.

His Lordship: The memorandum reads: 'We the jury find the plaintiff was negligent to the extent of not using necessary precautions as demanded by such adverse weather conditions.' Have you any comment to make upon that finding?

"Mr. Phelan: Do the jury find that that was the cause of the accident? I think that is apparently their intention, but they ought to say it in order to make the matter clear.

"His Lordship: Gentlemen of the jury, is that your conclusion, that the plaintiff Justin's negligence caused the accident?

"Mr. Plaxton: How can they say that?

"His Lordship: Wait a moment, please. It might only be a finding of contributory negligence.

Mr. Phelan: It might be, unless the jury is prepared to say that that was the cause of the accident.

His Lordship: Gentlemen of the jury, can you say that that was the cause of the accident? If that is what you conclude, you can add some words to the effect that the plaintiff Justin's negligence was the cause of the accident.

"The Foreman: By that memorandum I think that is what we inferred.

"His Lordship: If that is what you believe, just go back to your room and add those words, or words to that effect—I do not desire to suggest what words should be employed, but words

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to express what you really find. Just continue the sentence to that effect."

Whereupon the jury again retired and returned to the courtroom at 10.51 o'clock p.m.

"His Lordship: Your memorandum now reads: 'We the jury find that the plaintiff was negligent to the extent of not using necessary precautions as demanded by such adverse weather conditions, and was the cause of the accident.' It is not quite grammatical in form, but we will say nothing about that now.

"Upon these findings I am constrained to dismiss the action with costs."

Only question No. 1 of the series of questions submitted to them was answered by the jury; but to the paper containing them we find pinned, one below the other, the two memoranda above mentioned.

I have thought it advisable to set out these latter proceedings somewhat *in extenso* in order to make clear the course of the trial, which, in our opinion, unfortunately renders a new trial unavoidable.

In the first place, it seems open to doubt whether the second memorandum brought in by the jury should be regarded as an answer by them to questions 3 and 4, which were otherwise unanswered, or as intended to give a second reason, pursuant to the instruction of the learned trial Judge, for the negative answer which they made to question 1. Physically the paper on which this memorandum is written is attached to the sheet of paper containing the questions as if it might be intended as an answer to questions 3 and 4, and it was so treated by the learned Judge who delivered the judgment of the Appellate Division, and is also so dealt with towards the close of the respondents' factum, where counsel says that a certain conclusion for which he was arguing "is fortified by the jury's answers to questions 3 and 4," although he had, earlier in the factum, as he did at bar in this Court, dealt with the second memorandum as part of the jury's explanation of, or reasons for, their answer, "No," to the first question. So regarded, this second memorandum might present a serious obstacle to the success of this appeal. On the other hand, if it should be treated as made in response to questions 3 and 4, the second memorandum may amount to nothing more than a finding of contributory negligence on the part of the plaintiffs' driver.

But, however that may be, we are clearly of the view that the minds of the jury were so affected by the learned trial Judge's

direction to them that, although the tail light was out, and its being extinguished was a cause of the collision, the defendants would not be liable "if the driver was not aware of the light being out, because it had gone out suddenly before the impact"—which was tantamount to telling them that the statutory duty under sec. 9(1) was not absolute but involved civil liability under sec. 41(1) only if the non-observance of sec. 9(1) was in some degree attributable to personal fault or negligence of the defendant Hatch, the driver of the motor-truck of his co-defendant, and that, unless they found such fault or negligence to be established by the evidence, they should answer the first question in the negative—that that direction influenced all their findings.

In effect, the jury's findings, as they now stand, merely negative such personal fault or negligence of the defendant Hatch, because, having reached that conclusion, they may have deemed themselves dispensed from making any finding on the vital question whether the tail light of the defendants' truck was, or was not, in fact lighted and clearly visible at a distance of at least 200 feet, as prescribed by sec. 9(1), at the moment of the collision, or immediately prior thereto. The learned Judge had very properly said, earlier in his charge:—

"The first thing you have to determine, because it is at the very threshold of this case, is whether or not upon the evidence of all the witnesses both for the plaintiffs and for the defendants the rear light was burning on that truck and was visible on that occasion."

Upon that crucial question, owing to the course of the trial and notwithstanding the insistence of counsel for the appellants, there is no finding. The foreman's answer to the question of the learned Judge thus reported, "Am I to understand, gentlemen, that it is your conclusion from the evidence that the light did go out immediately before the accident, and that you so find?" "We do not know, sir," does not mean that the jury could not find whether the tail light was in fact lighted or extinguished, but only that they could not determine precisely when it had gone out, if it was in fact out. Nor does their first memorandum imply that the light was in fact out, as the learned Judge might appear to have thought:—

"Mr. Plaxton: Is there any doubt about the answer to the first question, my Lord?

"His Lordship: In what way? I think their assumption is: 'Assuming that the light may have gone out prior to the accident unknown to the driver, we find the defendant not negligent.'

"Mr. Plaxton: You are stating that as their assumption, my Lord?

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"His Lordship: That is their finding, I think.

"Mr. Plaxton: As long as that is clear, my Lord."

Having, in effect, been told that *negligence* causing the accident was the only matter for their consideration, and that the fact that the requirement of sec. 9(1), as to the tail light, was not complied with, would not, if established, amount, *per se*, to negligence, the jury, not improbably, put that aspect of the case entirely out of their minds when dealing with the question of the negligence of the plaintiffs' driver, and took the view that his negligence, which they, no doubt, found to have been proven, could alone in law be regarded as *negligence* causing the collision. Their second memorandum cannot, in any view of it, be taken to import more than this. It does not imply either that the tail light was in fact burning, or that, if not, its being out did not contribute to causing the collision. Fault attributable to the defendants being excluded, the only material negligence was that of the plaintiffs' driver, which was in that sense *the cause* (the jury, though invited to do so, did not say "the sole cause") of the collision. The direction to the jury as to the purview and effect of secs. 9(1) and 41(1) of the Ontario Highway Traffic Act was impliedly, if not expressly, approved in the judgment delivered by the Appellate Divisional Court in May, 1928. That that direction was erroneous in our opinion admits of no doubt under the decision of the House of Lords in *Great Western Railway Co. v. Owners of S.S. Mostyn*, [1928] A.C. 57, decided late in 1927, which apparently was not referred to either at the trial or in the Appellate Divisional Court.\* The head-note of the report reads as follows:—

"Under sec. 74 of the Harbours, Docks and Piers Clauses Act, 1847, the owner of a vessel doing damage to a harbour, dock or pier, or works connected therewith, is responsible to the undertakers for the damage, whether occasioned by negligence or not, where the vessel is at the time of the damage under the control of the owner or his agents."

In the course of his speech, Viscount Haldane says (pp. 61 and 63):—

"The claim is based on an allegation of negligence, resulting in liability at common law, and also on the provisions of sec. 74 of the Harbours, Docks and Piers Clauses Act, 1847, which it is said does not require proof of negligence in order to render it applicable. The Courts below have agreed in holding that negligence has not been proved, and the nautical assessors who have

\* This case was not referred to at the trial but was relied upon by the plaintiffs before the Appellate Division.



been present to advise us are of opinion that there was no negligence shewn. I understand that we are unanimously of the same opinion . . . .

"The question which we have to answer is whether, in a case in which neither negligence nor any other act of an unlawful nature has been established against the owners of the *Mostyn* or those in charge of her, sec. 74 makes the owners answerable for the damage done in this case to the dock.

"I assume that the master and those in charge were not answerable for any wilful act or negligence, inasmuch as none has been proved against them. But in the case of the owner the section does not in terms require any wrongful act to be established as the condition of liability. The words, taken by themselves, are unambiguous. The owner is to be liable for any damage done to the undertaking. My Lords, if the language of this section could legitimately be construed by us who sit here without regard to authority, I should find difficulty in saying that the appellants were not entitled to claim that it applied. It has been said that to take this view is to attribute to Parliament an intention which is hardly conceivable, the intention of making people liable for damage where they have been in no way to blame. But I am unable to attach much weight to this consideration, where the words are clear. What the motives of Parliament were we do not know and cannot inquire. It may be that it desired to encourage undertakers of this class by providing insurance at the cost of owners who are in no way to blame. There are instances of such a principle in modern statutes, such as the Workmen's Compensation Acts, and it may be that it was something analogous that was in the mind of the legislature. I do not know, and I feel myself precluded from even trying to inquire, or from speculating.

"But we cannot proceed here on this simple view. It has been established by a decision which is binding on us by this House that the language must be interpreted as subject to some qualification which is implicit in the words, and the question which alone we are free and bound to examine, is what this qualification is, and how far it extends."

After discussing at length the decision in *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743, the learned Viscount thus states his conclusion as to "what was really laid down" in that case (pp. 65, 66):—

"I think only that there having been no human agency as the cause, and the real cause having been the act of God, the case

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was not covered by the section. The learned Judges were at least agreed on this, that when the cause was not human agency but a *vis major* beyond human control, it did not come within the words.

"In the case before us there was not only no negligence, but, on the hypothesis which I am making, there was no breach of duty at all. It is therefore important to see whether the grounds of the decision in this House in the *Adamson* case laid down for us any different principle which was held to take the case outside the words of the statute. This is not easy to determine, for there was divergence of opinion."

After carefully analysing the speeches delivered in the House of Lords in *Adamson's* case, Lord Haldane concludes (pp. 71, 72):—

"We appear to me to be bound by the authority of the *Adamson* case to hold that the section in question is not to be read literally, but as applying when the damage complained of has been brought about by a vessel under the direction of the owner or his agents, whether negligent or not. The decision further exempts the owner when the vessel is not under such control but is for instance derelict. When there are facts to which it applies it effects an alteration in the common law which imposes a new liability to be sued on the owner, and to that extent changes not merely procedure but also substantive law."

Although Mr. McCarthy, for the appellants, practically rested his appeal on the authority of the decision in the *Mostyn* case, in the course of his very able argument in answer, Mr. Phelan, for the respondents, made no allusion to that very recent and most important decision, a careful study of which has failed to disclose to us any real ground of distinction between the statutory provisions there dealt with and those now before us. There, as here, the responsibility of the owner for damages done by his vessel (here, by his motor-vehicle) is declared in terms unqualified and unrestricted save by one exception, that of the vessel being under compulsory pilotage—here, the one exception is that of the motor-vehicle being in the possession of some person other than the owner, or his chauffeur, without the owner's consent. In each case alike the exception merely serves to emphasise the unlimited scope of the main provision. Obligated by the decision in the *Adamson* case to place a further limitation upon the responsibility of the owner created by sec. 74 of the English statute, the House of Lords in *Mostyn's* case confines that limitation most strictly to what they were bound to hold that the judgment in the *Adamson*

case necessarily implied. There is no earlier decision on the scope of the statute now before us which precludes our holding that it imposes, subject to the one exception expressed, unrestricted and absolute liability on the owner, thus giving to it the effect which we think its plain language clearly imports. But, if the restriction held to have been placed on the application of the English statute in *Adamson's* case should also be held to apply to the liability imposed by secs. 9(1) and 41(1) of the Ontario Highway Traffic Act, that would not help the present defendants, because they were not within it. If the rear or tail light was not burning, or if, though burning, it was not visible at a distance of at least 200 feet, neither of these facts can be attributed to an act of God; and the motor-truck was at the time of the collision admittedly under the direction of the owner or his agent.

It will be noted that Lord Haldane in the *Mostyn* case dealt with the arguments of counsel as to presumed intention and motives of Parliament. Similar arguments were advanced at bar in this Court. Conceding that sec. 41(1) was intended to impose civil liability upon the owner of a motor-vehicle where there had been a violation of the statute, counsel for the respondents argued that such responsibility is vicarious and must be confined to cases in which the person in charge of such motor-vehicle would be responsible at common law. We find nothing in the statute to justify so restricting its application. On the contrary, the imposition by sec. 41(1) of liability on the driver as well as the owner and the provisions of subsec. (3) seem to make it clear that the purpose of the section is not only to impose direct civil liability but also that that liability should be unrestricted, save as explicitly otherwise declared in the section itself. The inclusion of the driver's statutory responsibility is idle, if the application of the section is confined as Mr. Phelan contends.

We are accordingly of the opinion that the learned trial Judge misdirected the jury as to the scope and effect of secs. 9(1) and 41(1) of the Ontario Highway Traffic Act and that such misdirection affected their findings to such an extent that they cannot stand. It follows that the judgment for the defendants must be set aside and that a new trial must be ordered in favour of the appellants William R. Hall and Alice R. Dale.

While the Court is naturally reluctant to grant a new trial, it is satisfactory in this case to find such a clear and distinct ground of misdirection on which to base our order; for, otherwise, the later proceedings at the trial, by which the jury's findings were elicited, seem to us to have been so unsatisfactory that we

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should have to consider very carefully whether, in the sound exercise of judicial discretion, we ought not, on that ground, to direct a new trial rather than affirm a judgment based on a verdict so arrived at.

If, perchance, the Legislature should consider that our interpretation of the statute imposes a liability wider than was intended, that body can by appropriate amendment change the law in whatever direction it may deem proper.

There is no reason why on the new trial the jury should not be asked, at the outset, these two direct questions:—

1. Q. Did the defendants' motor-truck carry up to the moment of the collision a rear lamp lighted and casting a red light clearly visible at a distance of 200 feet?

2. Q. If not, did the failure to have such a light cause the collision?

Of course these two questions will be followed by questions appropriate to cover the other issues.

At the opening of the argument it was pointed out to counsel for the appellants that the claims of the plaintiffs Annie C. Hall and Frank J. Justin were each for an amount less than \$2,000, and that, as was held in *Armand v. Carr*, [1926] S.C.R. 575, and *Reynolds v. Canadian Pacific Railway Co.*, [1927] S.C.R. 505, the Court is without jurisdiction to entertain the appeal by them. An application to allow the case to stand over to permit of leave to appeal being asked from the Ontario Appellate Divisional Court, the Court felt itself obliged to refuse.\* The appeals of these two plaintiffs, Annie C. Hall and Frank J. Justin, were accordingly quashed. They will not, however, be required to pay to the defendants any costs in this Court.

The judgment of the Court, therefore, is that, as to the plaintiffs William R. Hall and Alice R. Dale, this appeal is allowed and the judgment dismissing the action is set aside with costs in this Court and in the Appellate Divisional Court to the successful appellants, and a new trial is ordered. The costs of the former trial will be reserved to the Judge who shall preside at the new trial.

*New trial ordered.*

\* On the 17th January, 1929, the plaintiffs Annie C. Hall and Frank J. Justin applied to the Appellate Division for leave to appeal and to extend the time for setting down their appeal, and to stay proceedings on the judgments against these plaintiffs. The application was granted. And on the 14th February, 1929, the Supreme Court of Canada allowed the appeals of these plaintiffs. The defendants on the 18th February, 1929, served notice of the presentation of a petition to the Privy Council for leave to appeal from the judgment of the Supreme Court of Canada.



## [APPELLATE DIVISION.]

SERVAIS V. SHEAR.

1928.

Dec. 28.

*Mortgage—Action by Mortgagee on Covenant for Payment—Inability to Restore Estate—Acquisition by Mortgagee of Title under Tax-sale.*

The judgment of ROSE, J., 61 O.L.R. 490, was reversed, and the plaintiff (mortgagee), being the transferee of the title under a tax-sale, was held, entitled to recover in an action upon the covenant in the mortgage-deed, notwithstanding that he had put it out of his power to transfer the land to the defendants in case they paid the mortgage-moneys.

*Clary v. Boulay* (1928), 61 O.L.R. 616, applied and followed.

*Per RIDDELL, J.A.*:—The only estate which the mortgagee was bound to reconvey on being paid the mortgage-money having been wiped out by the action of the "encumbrancer," the municipality, for which action the mortgagee was not responsible, he owed no duty to his mortgagor in respect of the land in which he had that estate.

AN appeal by the plaintiff from the judgment of ROSE, J., 61 O.L.R. 490.

December 10, 1928. The appeal was heard by LATCHFORD, C.J., RIDDELL, ORDE, and FISHER, JJ.A.

*Hamilton Cassels*, for the appellant, argued that it was an entirely new contract which the mortgagee got by buying in the property at the tax-sale. As the law only requires the mortgagee to protect the mortgagor's title, not the new title, the mortgagee could sue on the covenant. All the mortgagor's interest was wiped out by the tax-sale. Reference to *Clary v. Boulay* (1928), 61 O.L.R. 616; *Kelly v. Macklem* (1867), 14 Gr. 29.

*J. B. Allen*, for the defendants, respondents, contended that the cases cited on behalf of the appellant dealt more with the mortgagor's right to redeem than with his liability on the covenant. After such a purchase as here, if the mortgagee sues on the covenant, the mortgagor has a right to redeem. Reference to *Miller v. McCuaig* (1890), 6 Man. L.R. 539; *Smart v. Cottle* (1863), 10 Gr. 59; the Assessment Act, R.S.O. 1927, ch. 238, secs. 192 and 194.

December 28. LATCHFORD, C.J.:—This appeal is from a judgment of Mr. Justice Rose, dated the 27th December, 1927, and reported in 61 O.L.R. 490.

The facts sufficiently appear in the report.

Contrary to my first impression, I think the appeal must succeed.

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 1928. Divisional Court in *Clary v. Boulay*, 61 O.L.R. 616, which is  
 SERVAIS directly in point and adverse to the conclusion of the learned trial  
 v. Judge.

SHEAR. Accordingly the appeal must be allowed with costs and judg-  
 Latchford, ment entered for the plaintiff with costs. If the parties cannot  
 C.J. agree as to the amount due on the covenant, there will be a refer-  
 encé to the Master at Port Arthur. Costs of the reference to be  
 in the discretion of the Master.

ORDE and FISHER, JJ.A., agreed with the Chief Justice.

RIDDELL, J.A.:—The facts are not in dispute, and the whole question is one of pure law. In 1910, the defendant Shear and one F. W. Bagan made a mortgage on certain land; Bagan died, and the defendant Bagan is his administrator; the mortgage being unpaid, the owners of the equity of redemption neglected to keep the taxes paid; and the land was sold for taxes in 1919 to one Hodder. Hodder sold his rights to the plaintiff, mortgagee; and he received a tax-deed; he has since sold the land, and Mr. Justice Rose holds that, having been in a position to transfer the land to the defendants, in case they paid the mortgage-moneys, and having put it out of his power to do so, he cannot succeed in an action on the covenant to pay.

I am unable to agree with this view of the law—the extraordinary effect of which would be that the mortgagee must lose the money he paid for the land to Hodder.

The objection is based upon a supposed duty on the part of the plaintiff to transfer to the mortgagors the land upon being paid. But it has been decided—and there can be no possible ground for questioning the soundness of the decision—in *Clary v. Boulay*, 61 O.L.R. 616, that a mortgagee has the right to purchase the mortgaged land at a tax-sale for his own benefit, unless there is more in the case than the relation of mortgagor and mortgagee. I adopt the language of the Chief Justice of Ontario, in that case (pp. 617, 618): “No such circumstances are here present. The mortgagee owed no duty to any one to pay the taxes, did not use (his) position as mortgagee to become purchaser, did not purchase in (his) character as mortgagee, took no part in connection with the sale except to . . . pay the purchase-money, and (he) paid it not *quâ* taxes but *quâ* purchase-money.” It is true that in the present case, differing from the *Clary* case, the mortgagee did not buy directly at the tax-sale but from the pur-

chaser at the tax-sale; but that rather makes it the more certain, if possible, that he does not hold under the mortgage.

The mortgagee not being bound to consider the mortgage at all, when in possession of the land, how can it be that by selling the land he lays himself under an obligation to do so?

The law is, of course, perfectly settled that in the ordinary case the mortgagee, to succeed in an action on the covenant, must be in a position to transfer the estate which he has under mortgage to the mortgagor, if and when he is paid; but that rule of law has no application to the present state of affairs. It is "the estate" which he received from the mortgagor, not some other estate. As it is put by James, V.-C., in *In re Burrell* (1869), L.R. 7 Eq. 399, at p. 407, the mortgagee must be "in a position to restore the estate if the mortgage claim be satisfied." In that case, the mortgagee was not debarred from asserting his claim on the covenants, because, although he could not restore the estate, this was so, "simply because the freeholder, by title paramount, has evicted him and everybody else" (p. 407).

In the present case, the municipality, by statutory title paramount, has evicted the mortgagee and everybody else, *quoad* the estate under the mortgage. It is, no doubt, true that the plaintiff by paying the taxes might have prevented this eviction; but he was no more bound to do that than was the subsequent mortgagee in *Worthington & Co. Ltd. v. Abbott*, [1910] 1 Ch. 588, bound to redeem the previous encumbrance or to delay the prior encumbrancer in realising on his security: *cf. Beatty v. Bailey* (1912), 26 O.L.R. 145.

The only estate which the mortgagee was bound to reconvey on being paid the mortgage-money having been wiped out by the action of the "encumbrancer," the municipality, for which action the mortgagee was in no way responsible, I can find no justification for the proposition that he owed some duty to his mortgagor in respect of the land in which he had that estate: the mortgagee has not abused his position—or used it. I would allow the appeal and give judgment for the plaintiff for the amount due, with costs here and below.

*Appeal allowed.*

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## [APPELLATE DIVISION.]

1928.

Dec. 28.

REX V. ISBELL.

*Criminal Law — Conspiracy — Committal for Trial — Jurisdiction of Magistrate — Illegality of Proceedings in another Province — Remedy by Action—Removal of Bar—Legality of Process by which Defendant Brought before Magistrate in Ontario—Objection and Protest of Defendant—Overt Acts in Ontario in Furtherance of Conspiracy—Evidence—Overt Acts not Mentioned in Charge.*

The decision of McEvoy, J., 62 O.L.R. 489, was affirmed.

*Held*, that there was no need to pass upon the question of the alleged illegality of the forcible abduction of the defendant from Montreal, in the Province of Quebec; if the defendant was wronged in that proceeding, he had his remedy by action, and no barrier should be placed in his way by this Court or any one; he was not brought before the magistrate in Toronto, Ontario, on any illegal or irregular process; and, if he was in illegal custody when he was taken possession of by an officer to bring him before the magistrate, that was immaterial.

*Rex v. Walton* (1905), 6 O.W.R. 905, 10 Can. Crim. Cas. 269, and *McGuinness v. Dajoe* (1896), 23 A.R. 704, 714, followed.

2. It was not necessary to decide whether, if the appearance before the magistrate was effected by illegal force, and against the will and protest of the defendant, the magistrate would be precluded from proceeding; but, *semble*, applying *Regina v. Hughes* (1879), 4 Q.B.D. 614, that the objection and protest of the defendant made no difference: the defendant being present in Court, the illegality of the process by which he was brought there was immaterial.

3. The charge against the defendant being that at Toronto he did unlawfully conspire with G. and other persons, the evidence disclosed acts done by G. in Toronto in furtherance of the conspiracy, in writing to the defendant letters of that import:—

*Held*, that this was sufficient to found jurisdiction in the magistrate to commit for trial.

The mention of the overt act or acts in the indictment or other charge is not necessary—if an overt act is committed within the jurisdiction of the magistrate, he thereupon, without more, acquires jurisdiction to hear.

*Rex v. Kinnersley* (1719), 1 Str. 193, followed.

AN appeal by the defendant from the order and decision of McEvoy, J., in Chambers, 62 O.L.R. 489.

December 12. The appeal was heard by LATCHFORD, C.J., RIDDELL, ORDE, and FISHER, JJ.A.

R. H. Greer, K.C., and W. K. Murphy, for the appellant, argued that there was no evidence to warrant the committal for trial; and that there was no jurisdiction in the magistrate to make the order. On the latter point they contended that all the acts in connection with the conspiracy except some isolated



acts took place in Montreal, and these isolated acts did not give jurisdiction to the Court. The kidnapping of the appellant by Crown officers made it illegal for the magistrate to try the case: *Regina v. Hughes* (1879), 4 Q.B.D. 614; *Dixon v. Wells* (1890), 25 Q.B.D. 249; *Rex v. Pollard* (1917), 29 Can. Crim. Cas. 35. If a man protests the jurisdiction after being illegally arrested, as here, he must be let out and re-arrested: *Rex v. Suchacki* (1923), 41 Can. Crim. Cas. 166; *Rex v. Schmidel* (1920), 33 Can. Crim. Cas. 110; *Rifkin v. The King* (1925), 43 Can. Crim. Cas. 330; *Rex v. Flavin* (1921), 35 Can. Crim. Cas. 38; *Rex v. Marks* (1918), 31 Can. Crim. Cas. 257; *Rex v. Iaci* (1925), 44 Can. Crim. Cas. 275; *Rex v. Hanley* (1917), 41 O.L.R. 177; *Rex v. Kostich* (1919), 31 Can. Crim. Cas. 407. Then there was geographical lack of jurisdiction. No territorial jurisdiction was shewn by the evidence which gave the Toronto magistrate the right to deal with the matter.

[ORDE, J.A.:—The criminal law extends all over Canada.]

*Greer, K.C.*:—Subject to secs. 577, 587, 653, and 888 of the Criminal Code. The conspiracy was all hatched in Montreal. Only a letter or two from Toronto brought Ontario into the case. These letters were written to the appellant, who was in Montreal, and he did not answer them. A letter thus written and not answered is no evidence against the appellant. The conspiracy was completed in Montreal, and so the magistrate lacked jurisdiction: *Snow's Criminal Code*, 4th ed., p. 329; *Regina v. Connolly and McGreevy* (1894), 25 O.R. 151. On the question of venue counsel cited *Rex v. O'Gorman* (1909), 18 O.L.R. 427.

[THE COURT intimated that counsel for the Crown would have to meet only the last point argued by counsel for the appellant, namely, as to territorial jurisdiction, that there was no evidence to shew any conspiracy in Ontario.]

*Edward Bayly, K.C.*, for the Crown, on this point, submitted that the law had been laid down in the *Connolly-McGreevy* case (*supra*) that all that needed to be shewn to establish conspiracy was an overt act done in this Province in pursuance of a common design: *Archbold's Criminal Pleading, Evidence, and Practice*, 27th ed., p. 1398. The common design here was fraud to raise the price of stock. The letter from Gilbert, a conspirator in Toronto, to the defendant in Montreal, was evidence against both. So that founded venue here. The letter and the receipt in Toronto of false quotations were overt acts of the conspiracy. Sections 668 and 669 of the Code gave the magistrate jurisdiction.

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Greer, K.C., in reply, referred to *Rex v. Morency* (1917), 30 Can. Crim. Cas. 395.

December 28. The judgment of the Court was read by RIDDELL, J.A.:—An appeal by the defendant from the judgment of Mr. Justice McEvoy, 62 O.L.R. 489, by leave granted by Mr. Justice Fisher.

The appeal was argued at considerable length; but neither the relevant facts nor the points of law involved are numerous.

The facts are detailed with care in the reasons for judgment of Mr. Justice McEvoy and need not be repeated *in extenso*. It is plain that the accused was brought from Montreal against his will, on some process brought before a magistrate in Toronto against his will, and that, being in custody in this way, an information was laid against him, on the 11th October, 1927, for conspiracy at Montreal and Toronto, with Nathaniel Gilbert and others, to affect the market price of stock, that on that charge he was brought before Mr. J. E. Jones—this by enlargements was continued until the 16th November, and then withdrawn. In the meantime, however, another information was sworn—on the 31st October—of the same nature, against the defendant, the said Gilbert, and others, which need not be considered; and on the same day, an information was sworn against Isbell alone, charging him with a similar conspiracy with Gilbert and others. On the 4th November, Isbell, Gilbert, and another were brought before Mr. Jones on the two last-mentioned charges: the last alone was proceeded with and Isbell committed for trial. Mr. Justice McEvoy refused to set aside this committal; and the present appeal is from that refusal. Admittedly, Isbell protested at every stage and all the proceedings were *in invitum*: admittedly, too, the charge in the information of the 31st October is within the power of the magistrate to try, if the offence is alleged, as it is, to have been committed in Toronto.

A great deal of the argument was on the alleged illegality of the forcible adduction of the appellant from Montreal; in my opinion, there is no need for us to pass upon that question, and I do not—making it plain that I am not to be considered as looking upon it as illegal or as expressing disapprobation. If the appellant was wronged in that proceeding, the Courts are open and he should not be prevented by us or any one from having his wrongs righted. He was not brought before Mr. Jones in this matter on any illegal or irregular process; and the fact, if it be a fact, that he was in illegal custody when he was taken posses-

sion of by the officer to bring him before the magistrate is *nihil ad rem*. As well argue that one charged with murder is not to be taken from the gaol before a magistrate when he is in the gaol under an invalid commitment.

The matter is concluded for us by *Rex v. Walton* (1905), 6 O.W.R. 905, 10 Can. Crim. Cas. 269, in which it was argued that the prisoner had been illegally brought from Buffalo and then charged when in custody with the offence which gave the magistrate jurisdiction. The Court of Appeal, however, gave no effect to this contention—it was considered that the Court could not inquire into the circumstances under which the accused was brought into this country. But, even had it been the fact that he was brought before Mr. Jones illegally, the Court of Appeal has made it plain that the jurisdiction of the magistrate attached when he was before the magistrate “charged with the offence and his subsequent detention and commitment would be justifiable;” this appears from the hard-fought case *McGuinness v. Dafee* (1896), 23 A.R. 704, especially at p. 714. However other Courts may hold, we are bound by our Appeal Court’s decisions; and in this case I am wholly convinced that the decisions are right.

Whether, were the appearance before the magistrate effected by illegal force, and against the will and protest of the accused, the magistrate would be precluded from proceeding, it is not necessary in this case to decide; were it to call for decision, I should have no hesitation in holding that *Regina v. Hughes*, 4 Q.B.D. 614, applied and that the objection and protest of the accused made no difference; it is unnecessary to quote or criticise the cases in the different Provinces on that point, although they were all brought to our attention; and I have read them with care and the respect they deserve. The proposition that, the defendant being present in court, the illegality of the process by which he was brought there is immaterial, has long been textbook law: Roscoe, 15th ed., p. 955; Snow, 4th ed., p. 16; it being our function to find out and declare the existing and not make new law, we should not try to modify what is well established. *Non possumus et nolumus mutari leges*.

The only other point in the appeal which calls for consideration is whether the magistrate, upon the evidence before him, could rightly commit for trial. I think he could.

The charge was that Isbell “at . . . Toronto . . . did unlawfully conspire with . . . Nathaniel Gilbert . . . and other persons . . .” The evidence disclosed acts done by Gilbert in Toronto in furtherance of the conspiracy in writing to the

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accused letters of that import; this is sufficient to found jurisdiction.

Since the time of *Rex v. Kinnersley* (1719), 1 Str. 193, it has been law that the mention of the overt act or acts in the indictment or other charge is not necessary; that, if an overt act is committed within the jurisdiction of the Justice, he thereupon, without more, acquires jurisdiction to hear, is not and cannot be disputed.

I would dismiss the appeal with costs. If, however, the accused considers himself hampered in any action at law based on the proceedings by which he was brought into Ontario, any bar against such action should be removed.

*Appeal dismissed.*

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[APPELLATE DIVISION.]

1928.  
Dec. 28.

SMITH & GOLDBERG LTD. v. MOYER & Co.

*Principal and Agent—Sale of Goods—Authority of Secretary-treasurer of Incorporated Company—Previous Dealings and Conduct—Ostensible Authority—Previous Repudiation by President of Company—Notice to Purchasers.*

A secretary or secretary-treasurer of an incorporated company has as such no authority to bind the company.

In matters within the scope of his authority, he might bind the company, or in trifling details of constant occurrence; but his authority could not be presumed in a sale transaction in which a sum of \$2,500 was involved.

It was contended that, by its previous course of dealing with the defendants, the plaintiff company had represented that G., its secretary-treasurer, had authority to bind it as its agent and that the defendants had had no notice that his authority had been determined:—

*Held*, that the authority of an agent, where it depends merely upon the conduct of the principal during a course of dealing, must, if it is to be binding upon the principal, be exercised in the customary manner; and in this case it could not be said that G., after repudiation by the chief executive officer of the company, of which the defendants had notice, still had *ostensible* authority to bind the company.

AN appeal by the plaintiff company from the judgment of LOGIE, J., at the trial, in favour of the defendants upon their counterclaim for the sum of \$2,500 agreed to be paid to the defendants under a "settlement" made by H. E. Goldberg, purporting to act for the plaintiff company, of disputes between the plaintiff company and the defendants.



October 17. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, JJ.A.

*R. H. Greer*, K.C., and *A. H. Brown*, for the appellant company, argued that the settlement made by Goldberg with the defendants was not binding on the appellant company. There was no enforceable contract between the appellant company and the defendants, and there was no consideration for the alleged agreement of settlement. Goldberg had no authority to enter into the agreement for settlement. Reference to *A. R. Williams Machinery Co. Ltd. v. Crawford Tug Co. Ltd.* (1908), 16 O.L.R. 245, at p. 248; *Myers v. Union Natural Gas Co.* (1922), 53 O.L.R. 88; *Schmidt v. M. Beatty & Sons Ltd.* (1916), 10 O.W.N. 230; 1 A. & E. Encyc. of Law, p. 698; *Hamilton and Port Dover Railway Co. v. Gore Bank* (1873), 20 Gr. 190. The Statute of Frauds barred the counterclaim, as Goldberg had no authority to sign the "confirmation" so as to bind the company.

*I. Levinter*, for the defendants, respondents, contended that Goldberg was secretary-treasurer of the appellant company at the time he made the settlement with Moyer, and so had power to bind his company by signing the confirmation in the manner he did, and thus satisfied the Statute of Frauds. But, even if he had ceased to be an officer of the company, he had ostensible authority to bind the company. Reference to *McKnight Construction Co. v. Vansickler* (1915), 51 Can. S.C.R. 374, at p. 384; *Canadian General Securities Co. Ltd. v. George* (1918), 42 O.L.R. 560; *James Richardson & Sons Ltd. v. J. McCarthy & Sons Co. Ltd.* (1921), 49 O.L.R. 60, at p. 66; *Foley v. Commercial Cars Ltd.* (1922), 52 O.L.R. 174, at p. 178; *Acton Tanning Co. v. Toronto Suburban Railway Co.* (1918), 56 Can. S.C.R. 196.

December 28. RIDDELL, J.A.:—This is an appeal, in respect of the counterclaim only, against the judgment of Mr. Justice Logie at the trial without a jury, at Toronto. The facts are not complicated, and may be stated in a small compass.

The plaintiff is a joint stock company carrying on business in Toronto; the defendants a "company" not incorporated, and carrying on business in Fort Wayne, Indiana; the firm of McNeillie & Company carry on business in Toronto as brokers in hides and skins.

On or about the 30th December, 1927, the firm of brokers acting for the defendants purchased for them a quantity of hides, etc., one Harry E. Goldberg acting for the plaintiff company in arranging the sale. Goldberg was the secretary and treasurer of

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the plaintiff company, and did a considerable part of its regular business; some part of the negotiations for the sale in question was by and between a member of the defendant "company" and Goldberg, but the ultimate terms were fixed through the brokers acting for the American firm.

Following their usual system, the brokers, when the matter was arranged, sent papers in the form of "bought and sold notes" to the parties for their signature and return; the defendants signed their note and returned it but the plaintiff company did not. There arose some controversy concerning the average weight of the hides, and the plaintiff company refused to sign the "confirmation" (as the note is called). The president, when applied to by the brokers, said he would not sign. Then, after some negotiations and actions of no moment on this inquiry, Smith, the president, said specifically to the brokers that he was not going to deliver the hides; of this the brokers notified their principals immediately, as well as of the fact that the plaintiff company had sold the hides to another.

Thereafter the brokers got Goldberg to sign the "confirmation;" this he did by signing "Smith and Goldberg, by H. E. Goldberg;" the brokers got this in duplicate and sent one to their principals at Fort Wayne.

According to the evidence adduced at the trial by the defendants, there was a meeting called of the plaintiff company; the solicitor present says: "The meeting was really called to discuss this case of Goldberg and Moyer; I didn't understand it was an annual meeting at all; and it was as a result of Goldberg stating he had sold the goods that they passed these resolutions, putting him out as secretary and probationing him as an employee."

It is perfectly plain that Goldberg knew that his company had repudiated the sale to the defendants, and had sold the goods included in the sale so repudiated; but the very day after this stormy meeting we find him at Fort Wayne interviewing the defendants, without the knowledge and consent of the responsible officers of the company. Not satisfied with what can only be characterised as an act of treachery to his company in signing a "confirmation" intended to make them legally bound by a document which the company had repudiated, he now, in Fort Wayne, purported to arrange a settlement of the dispute by agreeing to pay of the company's money \$2,500 to the defendants. It is, I presume, consistent with the conception held by him of honesty and faithfulness to his employers, to consider such an action

as proper. But of that I need say nothing; it is necessary to pass only on the legal effect.

Upon an action being brought for a cause of no importance here, the defendants counterclaim for the \$2,500 agreed to be paid under the "settlement" at Fort Wayne, and the learned trial Judge has given effect to the claim and directed judgment to be entered accordingly. The plaintiff company now appeals.

The Statute of Frauds is pleaded, and it is not disputed that it is an effective bar to the counterclaim unless either the "confirmation" or the Fort Wayne "settlement" is sufficiently signed to answer the provisions of the statute. There is nothing in the way of ratification or of conduct to assist the signature, and the question becomes one of pure law.

The law is not doubtful: it is thus laid down in 2 C.E.D. (Ont.) p. 472: "A secretary or secretary-treasurer has as such no authority to bind his company," citing *Myers v. Union Natural Gas Co.*, 53 O.L.R. 88; *A. R. Williams Machinery Co. Ltd. v. Crawford Tug Co. Ltd.*, 16 O.L.R. 245; *Hamilton and Port Dover Railway Co. v. Gore Bank*, 20 Gr. 190. See also text-books like *Palmer's Company Law*, 11th ed., p. 1198, etc.

It is not, of course, questioned that in matters within the scope of his authority he might bind his company, or in trifling details of constant occurrence; but such an authority cannot be presumed in a transaction of such a character as the present.

I would allow the appeal and dismiss the counterclaim with costs, here and below.

ORDE, J.A.:—I agree with the judgment of my brother Riddell.

The defendants' recovery upon their counterclaim depends solely upon the question whether or not Goldberg had authority to bind the plaintiff company by signing on its behalf the memorandum of settlement and the confirmation of the oral contract of sale made with the brokers.

It is not contended that the brokers were the plaintiff company's agents in effecting the sale, and it is admitted that unless one or the other of the two written memoranda just mentioned is so signed as to bind the plaintiff company the Statute of Frauds applies and the counterclaim must fail.

The argument that Goldberg had authority by virtue of his office as the secretary-treasurer of the plaintiff company to enter into binding contracts for the sale of its goods was not seriously pressed and may be ignored.

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Mr. Levinter confined his contention to the ground upon which the learned trial Judge found the plaintiff company liable, namely, that by its previous course of dealing with the defendants the plaintiff company had represented that Goldberg had authority to bind it as its agent and that the defendants had had no notice that his authority had been determined.

Now, if the written instruments upon which the defendants rely, and particularly the confirmation of the brokers' bought and sold note (exhibit 1), had been signed by Goldberg in the usual course of business, the plaintiff company might be bound, notwithstanding the actual termination of Goldberg's authority. But that is not what happened.

It must be elementary that the authority of an agent, where it depends merely upon the conduct of the principal during a course of dealing, to be binding upon the principal must be exercised in the customary manner. In the present case, before Goldberg signed the brokers' note by way of confirmation of the sale, the president of the plaintiff company had notified the brokers that the company repudiated the sale. After that, anything done towards the completion of the contract, or any step taken to make it binding upon the principal, must, in the very nature of things, be out of the ordinary course of business. How it can be said that, in spite of repudiation made by the chief executive officer of the plaintiff company, Goldberg still had any *ostensible* authority to bind the company, is a mystery to me.

The brokers, who were clearly not the agents of the plaintiff company, were, I think, just as clearly the agents in this transaction of the defendants, and the defendants cannot rely upon any lack of actual notice of the repudiation to support their claims.

As for the memorandum which Goldberg signed purporting to settle the defendants' claim for \$2,500, no ostensible authority based upon the previous dealings between the parties gave him any such power as this. The document is, in my opinion, just so much waste paper.

The appeal must be allowed and the counterclaim dismissed, both with costs.

LATCHFORD, C.J., and MIDDLETON, J.A., agreed with ORDE, J.A.

MASTEN, J.A., being absent on account of illness, took no part in the judgment.

*Appeal allowed.*



## [APPELLATE DIVISION.]

SPARKS &amp; MCKAY v. LORD.

1929.

Jan. 11.

DOMINION LUMBER AND COAL CO. v. LORD.

*Mechanics' Liens—Mechanics' Lien Act, R.S.O. 1927, ch. 173, sec. 5—Claim of Lien not Registered against whole of Land Enjoyed with Building—Registration against Land Covered by Wall Utilised by the Permission of Owner in Constructing Building—Severance of Part of Land by Lease—Mortgage—Effect of Sale under, as to Subsequent Sale in Proceedings to Enforce Liens—Statutory Notice to Purchaser.*

The Mechanics' Lien Act gives a lien on not only the land upon which the building is erected and the building itself, but also on "the land . . . enjoyed therewith:" sec. 5; but, *semble*, the lienor may abandon his lien on any part without interfering with his right in respect of the rest.

The decision in *Whalen v. Collins* (1895), 164 Mass. 146, that in Massachusetts the lienor must claim his lien over all the property in respect of which he is given a lien, not approved.

In this case the plaintiffs' claim of lien was registered against the part of a lot upon which they had contracted to erect a market building and against half the wall of a building immediately to the south which was utilised in the construction of the market building; and the owners, before any work was done for which a lien was claimed, had severed this property from the rest by leasing it to a commercial company, so that it could no more be said to be "enjoyed" with the rest of the land:—

*Held*, that the half of the wall was land upon which work was done, and was subject to the lien; and the claim was properly registered, whether the law was as in Massachusetts or not.

*Held*, also that a sale of the whole lot under the power of sale in a first mortgage registered in 1925 had not the effect of preventing a sale of the lot in proceedings to enforce lien-claims registered in 1927, the purchaser having bought with full statutory notice of the liens encumbering the property.

APPEALS by the defendant James P. Steedman in two actions under the Mechanics' Lien Act from so much of the judgment of the Deputy Judge of the County Court of the County of Wentworth as declared the plaintiffs entitled to liens in priority to the appellant.

December 13, 1928. The appeals were heard by LATCHFORD, C.J., RIDDELL, ORDE, and FISHER, JJ.A.

*The Hon. G. Lynch-Staunton, K.C., and H. A. F. Boyde*, for the appellant, argued that if Sparks & McKay had a lien at all (which was denied) it was on the whole lot (not merely on the portion of the lot against which they had filed their claim) and would have to be so registered. They also contended that the

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learned trial Judge had no right to order a sale of the lands, in these proceedings, because the property had already been sold under the mortgage by the Canada Permanent Mortgage Corporation. On the first point, counsel submitted that the Act gives a lien on not only the land on which the building is erected and the building itself, but also "the land . . . enjoyed therewith:" Mechanics' Lien Act, R.S.O. 1927, ch. 173, sec. 5. Reference was made to *Whalen v. Collins* (1895), 164 Mass. 146, which decided that the statutes do not authorise the holder of a mechanic's lien, at his own option, to establish and enforce it upon a part only of the land subject to the lien. On the same point, see *Security Lumber Co. Ltd. v. Anaka*, [1927] 2 D.L.R. 987, and cases cited therein. On the second point, counsel submitted that the learned trial Judge could only order a sale of the interest of the East End Markets Ltd., as could be seen by a reference to the Act, sec. 35 (4). Reference to *Hutson v. Valliers* (1892), 19 A.R. 154; *Wentworth Lumber Co. v. Coleman* (1904), 3 O.W.R. 618; *Martello v. Barnet* (1925), 57 O.L.R. 670. The lien should have been filed against the market company's interest in the whole property. In the Dominion Lumber and Coal Company's case, the lien was registered against the whole property.

*Christopher C. Robinson*, K.C., and *E. G. Binkley*, for the plaintiffs Sparks & McKay, respondents, contended that they had properly registered their claim against a portion of the lot; in fact they could not rightly have registered it against more. Reference to secs. 5(1), 7(3), 28(2) of the Act. They could not register against the whole lot because it was not "occupied" by the building as required by sec. 5 (1). Nor was their building "enjoyed" with the market company's building as required by sec. 5(1). The Massachusetts case is not an authority because the statute is different from ours. But, apart from this, the owner himself severed this property from the rest, before any work was done for which a lien is claimed, by leasing part of it to the Woolworth Company. The learned trial Judge did just what he should have done in ordering the sale in these proceedings. See sec. 7 (3) of the Act. Apart from this section these claimants would be cut out by the mortgage sale. If this sale could not be ordered, a lienholder would lose his lien by acts over which he had no control. Reference to *Manners v. Cain* (1927), 60 O.L.R. 644.

*H. E. B. Coyne*, for the plaintiffs the Dominion Lumber and Coal Company, respondents, adopted the argument just delivered, and said that as to the third mortgage, before the assignment of

it to Lord, these respondents had registered their lien. At that time the land was subject to only \$8,000 encumbrance, and nothing could be done to increase the priority over them. The assignee took at his peril.

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January 11, 1929. The judgment of the Court was read by RIDDELL, J.A.:—These two appeals, involving the same points, from the judgment of the County Court Judge at Hamilton in a proceeding under the Mechanics' Lien Act, were argued together in the sense that the former was fully argued, and we were asked to consider these arguments as adduced in the latter also.

In the city of Hamilton there are two streets running at right angles to each other, Ottawa-street running north and south, and Barton-street east and west. At the north-west corner stands a brick building used by the east end market, running south on Ottawa-street. On the 19th August, 1927, the East End Markets Ltd. made a lease to the F. W. Woolworth Company of land south of this building for ten years, agreeing in the lease to erect a building thereon according to plans theretofore agreed upon. This lot may, for convenience, be called the Woolworth lot, as it was on the argument. There were some foundations, etc., upon the lot at the time, but no completed building. In September, 1927, the claimants Sparks & McKay entered into a contract with the defendant Lord, acting for the market company, to build the required building. In the construction of the building, they utilised half of the south wall of a building immediately south of the market building. On failing to receive payment they filed claims for mechanics' liens on the Woolworth lot and half this wall. It is one of the grounds of complaint that they had no right to file a claim on this property alone, as the Act gives a lien on not only the land upon which the building is erected and the building itself, but also "the land . . . enjoyed therewith:" R.S.O. 1927, ch. 173, sec. 5. It may be as well to dispose of this objection at once. It is based upon the decisions in Massachusetts upon a not dissimilar statute, Public Statutes of Massachusetts, 1882, ch. 191, although that statute, indeed, gives the lien specifically upon "the lot of land upon which the (building) is situated."

The case of *Whalen v. Collins*, 164 Mass. 146, and the cases cited therein, seem to decide that in Massachusetts, under that statute, the lienor must claim his lien over all the property in respect of which he is given a lien. In my view, the lien attaches



App. Div. in whole and in part to all parts of the property liable to it, so  
1929. that every cent is a lien on every inch; and he may abandon his  
lien on any part without interfering with his right in respect of  
SPARKS the rest or any part of it. The owner has no right to complain;  
& MCKAY all he has to do is to pay the claim; and the necessity of such a  
v. claim is wholly due to his own default.  
LORD.

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J.A.

But in this case there is no necessity to decide this point. Those who had the undoubted right so to do had, before any work was done for which a lien is claimed, themselves severed this property from the rest by leasing it to the Woolworth Company, and it could no longer be said to be "enjoyed" with the rest of the land.

The contractors being permitted to make use of half of the wall of the building south of the market building, this half was land upon which work was done, and clearly was subject to the lien. I am of opinion that the claim was properly registered whether our law is as in Massachusetts or not.

The lien attaching, and the claim being properly filed, the next objection is to be considered.

Lord, the owner of the whole lot, put three mortgages upon it: (1) 1925, August 10, to the Canada Permanent for \$80,000; (2) 1925, August 18, to a trustee for creditors for \$28,000; and (3) to W.R. Mills for \$10,000, on which was advanced only \$8,000. Lord sold the whole land to the East End Markets Ltd., and gave a deed dated the 6th May, 1926, yet unregistered. Acting for the company, Lord, in September, 1927, entered into the contracts under which the claims for lien were made—the building to be erected being that which the company had agreed to build for Woolworth. Steedman had bought the second mortgage in August, 1925, and the third in the next month, giving the full value and being unaware of the fact that only \$8,000 had been advanced on the third.

The Canada Permanent, not being paid, began proceedings under the power of sale in their mortgage, offering the land for the first time in April; and, the sale being postponed from time to time, but becoming effective on the 17th December, 1927, Steedman bought for \$125,000.

The Sparks claim was registered on the 12th December, 1927, and the Dominion claim on the 13th January, 1928, and it stands on a different footing from the other. It will be well to deal with the former first.



It is argued that the sale by the Canada Permanent under the mortgage has had the effect of preventing a sale of the property in these proceedings. I am unable to follow this contention. Of course, if such is the law, we should have the anomaly of a statutory lien wiped out by acts over which the lienor has no control. If such a sale could under any circumstances have any effect, it certainly could not in a case in which, as here, the purchaser bought with full statutory notice of the liens encumbering the property.

The judgment in this, as in all other respects, follows the form given by the statute, and I can find no error in the form or in the substance.

I think that the appeal in the Sparks & McKay case must be dismissed with costs, and that we are not called upon to decide the full force or effect of the judgment. No doubt the purchaser at the sale will take care of his own interests; we are concerned with the rights of the lienors only.

The lien of the Dominion company stands quite as high as that of the other plaintiffs, and the appeal against them must be dismissed also, and with costs.

*Appeals dismissed.*

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# [APPELLATE DIVISION.]

## SIFTON v. CITY OF TORONTO.

1929.

Jan. 14.

*Assessment and Taxes—Income Tax—City By-law Adopting Assessment of Previous Year—Removal of Plaintiff from Municipality—Payment of Tax under Protest—Action to Recover Amount Paid—Dismissal—Appeal—Divided Court—Statutes.*

The plaintiff resided in the city of Toronto from the beginning of 1923 until the 14th December of that year. He was assessed in 1923 in respect of his income and paid the city taxes thereon. On the 14th December he ceased to reside in Toronto and became a resident of another municipality, wherein he continued to reside during the whole of 1924. As authorised by the Assessment Act, R.S.O. 1914, ch. 195, sec. 56 (1), the city council, on the 28th February, 1924, passed a by-law adopting "the assessment made in the year 1923 for the year 1924 . . . as the assessment for . . . the year 1924 on which the taxes for the year 1924 are to be raised." (There was no foundation for the statement that the assessment made in 1923 was for 1924.) The city corporation in 1924 demanded from the plaintiff a sum of money as income tax, which he paid under protest, and by this action in a County Court

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sought to recover. The action was dismissed by the County Court and the plaintiff appealed.

Upon the question whether, because of his assessment in 1923 and of the adoption of that assessment by the by-law, the plaintiff became liable to pay the income tax demanded in 1924, notwithstanding that he had ceased to be a resident of the city, the appellate Court was divided in opinion and the judgment of the County Court was affirmed.

The following statutory provisions were considered:—

The Assessment Act, R.S.O. 1914, ch. 195, secs. 2 (i), 4, 11, 12 (1), 50, 56, 57, 82, 83, 95 (3), 118.

The Consolidated Municipal Act, 1922, 12 & 13 Geo. V. ch. 72, secs. 1 (2), 249, 297, 300.

The Assessment Amendment Act, 1922, 12 & 13 Geo. V. ch. 78, sec. 11.

The Assessment Act, R.S.O. 1927, ch. 238, sec. 98 (3).

AN appeal by the plaintiff from the judgment of the County Court of the County of York (WIDDIFIELD, Jun. Co. C.J.), dismissing an action for the return of \$176.46 paid by the plaintiff to the defendant municipal corporation under protest, the same being the amount of income tax demanded by the corporation in the year 1924.

October 11 and 12, 1928. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and GRANT, JJ.A.

The appellant in person (with him *J. C. M. MacBeth*) argued that the taxes collected from him were in respect of the year 1924 and not 1923. The income to be taxed according to the Municipal Act, R.S.O. 1914, ch. 192, sec. 297(1), was the current year's, and there was no authority to assess in any year the income of the previous year: *City of Ottawa v. Egan*, [1923] S.C.R. 304; *Re Donald Mason & Co.* (1927), 61 O.L.R. 350, [1927] 4 D.L.R. 1061. Only property within the municipality could be assessed and levied upon. The plaintiff, and therefore his income, were not within the taxing jurisdiction of the municipality of Toronto during any part of 1924. Therefore no tax was lawfully imposed: *City of London v. Watt & Sons* (1893), 22 Can. S.C.R. 300; *City of Toronto v. Quebec Bank* (1917), 40 O.L.R. 544; *Re Fox and City of Windsor* (1925), 57 O.L.R. 243; *Re Cecilian Co. Ltd.* (1922), 51 O.L.R. 649; *Re Palmer and City of Toronto* (1924), 26 O.W.N. 84; *Re Blackburn and City of Ottawa* (1922-4), 52 O.L.R. 183, 55 O.L.R. 494. It was not the intention of the Legislature that a person who moved from one municipality to another should be doubly taxed: *City of London v. Watt & Sons*, *supra*; *City of Ottawa v. Nantel* (1921), 51 O.L.R. 269, at p. 276. The statutory remedy by revision and appeal was not available to the appellant and cannot preclude his right to the remedy sought

in this action. The by-laws passed in 1924 were *ultra vires* and a nullity so far as the 1924 income of the appellant was concerned, because he and his income were outside the municipality during that year, and the power of the municipality to tax was limited to assessment and levy by by-law during the same year upon property within the municipality.

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*W. G. Angus*, for the defendant corporation, respondent, contended that the assessment in question was an assessment on the appellant's income for the year 1923 and not that of 1924. The appellant, having been so assessed, was liable for the taxes levied, despite the fact that he moved away from Toronto: Assessment Act, R.S.O. 1927, ch. 238, sec. 98 (3). The appellant, not having appealed to the Court of Revision, as was his right, was concluded by what appeared on the assessment roll.

*MacBeth*, in reply.

January 14, 1929. MULOCK, C.J.O.:—In this action the plaintiff seeks to recover from the defendant, the Corporation of the City of Toronto, the sum of \$176.46, being the amount of income tax claimed by the city corporation to have been due by the plaintiff and which he paid under protest. The trial Judge dismissed the action, and from his judgment the plaintiff appeals.

The plaintiff resided in the city of Toronto from the commencement of the year 1923 until the 14th December, 1923. He was assessed in the year 1923 in respect of his income and paid to the city corporation the taxes thereon. On the 14th December, 1923, he ceased to reside in the city of Toronto, becoming a resident of the township of North York, where he continued to reside throughout the whole of the year 1924. He was assessed by the township corporation in 1924 on his income for that year and paid the taxes thereon to the township corporation.

As authorised by the Assessment Act, R.S.O. 1914, ch. 195, sec. 56, subsec. 1, the Council of the Corporation of the City of Toronto, on the 28th February, 1924, passed the following by-law: "The assessment made in the year 1923 for the year 1924, whereby the assessed value of all the ratable property in the said city of Toronto is shewn to be the sum of \$847,920,577, is hereby adopted as the assessment for the city of Toronto for the year 1924 on which the taxes for the year 1924 are to be raised," etc.

There does not appear to be any foundation for the statement in the by-law that the assessment made in 1923 was for the year 1924.

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The question here to be determined is whether, because of his assessment in respect of his income by the city corporation in 1923 and of the adoption of such assessment by the said by-law, the plaintiff became liable to pay to the city corporation the income tax demanded and collected from him in 1924.

Counsel for the city corporation contended that the money exacted from the plaintiff was due in respect of his income for the year 1923. The by-law in effect states that the taxes to be levied in 1924 on the basis of the assessment of 1923 are for the purpose of enabling the city corporation to meet its needs for the year 1924. The council of the municipal corporation, in my opinion, is not entitled to impose an assessment or tax in respect of income enjoyed by a person in a previous year in order to apply the tax towards meeting the financial needs of the corporation in a succeeding year. The Municipal Act, R.S.O. 1914, ch. 192, sec. 297, enacts as follows: "(1) Subject to subsection 13 of section 397, the council of every municipality shall in each year assess and levy on the whole ratable property within the municipality a sum sufficient to pay all debts of the corporation, whether of principal or interest falling due within the year . . ." This is also found in sec. 297(1) of the Consolidated Municipal Act, 1922, 12 & 13 Geo. V. ch. 72.

"Ratable property" here includes income (12 & 13 Geo. V. ch. 72, sec. 1(2)).

In *City of Ottawa v. Egan*, [1923] S.C.R. 304, it was held that the principle of income assessment and taxation expressed in the existing legislation was that it is the income of the current year which is assessable and taxable, and that, for the purpose of being applied in payment of debts of the corporation falling due in the same year. The head-note of that case, clearly summarising the views of the Court, says: "The income to be taxed is that of the current year. The income of the preceding year is only a basis from which to estimate the former."

The plaintiff, not having been a resident of the city at any time during the year 1924, was not assessable by the city in respect of his income of that year (*City of Ottawa v. Keefer* (1923), 54 O.L.R. 86). Nevertheless he was so assessed, and the question is, what course was open to him in order to be relieved of such assessment? The assessment of 1923, by the by-law adopted as that of 1924, was subject to revision (Assessment Act, sec. 56, subsec. 3), and the plaintiff had the right and the opportunity to appeal from his assessment to the Court of Revision and



if there unsuccessful to the County Court Judge. But he did not appeal, and his assessment became confirmed. The Assessment Act, R.S.O. 1914, ch. 195, sec. 83, enacts as follows: "It is hereby declared that the Court of Revision, the County Judge, the Ontario Railway and Municipal Board, and every Court to which and every Judge to whom an appeal lies under this Act have jurisdiction to determine not only the amount of any assessment, but also all questions as to whether any persons or things are or were assessable or are or were legally assessed or exempted from assessment."

In *Village of Hagersville v. Hambleton* (1927), 61 O.L.R. 327, it was held that, the Legislature "having thus given to the Court of Revision jurisdiction to determine . . . the amount of any assessment . . . and also all questions as to whether any persons . . . are . . . , assessable or are . . . legally assessed or exempted from assessment," and the Court of Revision having dealt with the question, it became *res judicata*, and therefore the appellate Court had no jurisdiction to entertain an appeal.

The Assessment Act, R.S.O. 1914, ch. 195, sec. 2 (i), declares that "Last revised assessment roll" shall mean the last revised assessment roll of a municipality; and an assessment roll shall be deemed to be finally revised . . . when the time within which appeal may be made has elapsed." Whether in the present case the assessment roll was revised or not, the time within which an appeal might have been made therefrom elapsed; and, the assessment having been confirmed, the case comes within *Village of Hagersville v. Hambleton*.

The appeal fails and is dismissed and the action is dismissed but without costs.

MAGEE, J.A.:—The appellant seeks to recover back from the Corporation of the City of Toronto, \$176.46, which he paid under compulsion and under protest, as being charged against him as income assessment on the collector's roll for the year 1924, although he was not during any part of the latter year a resident of the city. He was, during the whole of that year, a resident of the adjoining municipality of North York, and was charged on the collector's roll of the latter municipality for that year with, and paid taxes on, his assessment.

The city corporation seeks to justify the charge and to retain the money because in that year, 1924, it had availed itself of the

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1929. 1914, ch. 195, as amended in 1923, by 13 & 14 Geo. V. ch. 45, sec.  
2, and had adopted the assessment roll of 1923 as the assessment  
SIFTON on which the taxes for 1924 were fixed and levied; and the city  
v. CORPORATION says that Mr. Sifton was properly assessed in that  
CITY OF assessment roll made in 1923, because he was a resident of the  
TORONTO. city till December of that year, and that the assessment roll, un-  
Magee, J.A. less appealed against to the Court of Revision, is final.

The city has for a good many years—like many other cities and towns—availed itself each year of, and adopted, the assessment made in the previous year, and it has become quite common to speak of the assessment roll made in one year as being the assessment roll for the next year—but this is erroneous. The assessment roll ordinarily would be, and in the great majority of municipalities, especially rural ones, is, under sec. 50 of the Assessment Act of 1914 (now sec. 53 of R.S.O. 1927, ch. 238), completed by the assessor by the end of April, but the special provision was made later that cities and other municipalities might, instead, fix the time for completing the assessment as late as September; and, if that were done, the council of the following year might adopt the assessment roll as the assessment for that next year. But that was not compulsory, and an assessment roll though made late in any year was still the assessment roll for that year and might be adopted for that year's taxation and might not be adopted at all for the next year, as a new assessment roll might be made, or it might be adopted for both years. Therefore Mr. Sifton could not successfully appeal against that assessment roll of 1923 to the Court of Revision even if he had removed from the city before it was completed.

Now, by sec. 5 of the Act of 1914, now sec. 4 of the Act of 1927, all income as therein mentioned shall be liable to taxation; and, by sec. 11 of the Act of 1914 (amended in 1922, ch. 78, secs. 9, 11), every person shall be assessed in respect of income, and the income to be assessed shall be the amount of the income for the previous calendar year. Thus a person might be assessed in 1923 for the amount of his income for 1922 and pay taxes on that amount in 1924. But, by sec. 12 of the Act of 1914 (now sec. 11 of the Act of 1927), every person assessable in respect of income shall be so assessed in the municipality in which he resides. That must mean that he cannot be assessed for the same year in a municipality where he does not reside.

Now, does the city council of 1924, by exercising its option

to adopt the assessment roll of the previous year, acquire the right to make any one pay twice over or to make any one pay whom it could not assess? It seems to me to be unnecessary, and in fact improper, so to construe the statute. What was intended by the Legislature was that the city council might adopt the roll instead of making a fresh assessment against those persons or properties liable to pay, but took the risk of invalidity of the roll of 1923 as against persons whom it could not assess—who might be dead or in China. That there was no appeal to the Court of Revision after such adoption made in fact no difference. In *Nickle v. Douglas* (1875), 37 U.C.R. 51, it was held that no appeal was necessary where there was no right to assess.

I would agree with my brother Hodgins that the appeal should be allowed and the plaintiff have judgment, both with costs.

HODGINS, J.A.:—The plaintiff lived within the city of Toronto until the 14th December, 1923, and then left the city permanently, settling in the township of York. He had, earlier, filed an income return for 1923 based on his income in 1922. The amount mentioned in this return was inserted in the assessment roll, and the same became confirmed, as no appeal was or could be taken by him with regard to the same.

In 1924, the plaintiff made and received his income in the township of North York, and made his income return to that corporation, and he is on the assessment roll thereof for his 1924 income.

The parties to the action do not agree as to what the moneys in question represent. The plaintiff says they represent income tax levied by the City of Toronto in 1924 and for the year 1924, while counsel for the City of Toronto says the moneys represent income tax on the plaintiff's income for 1923.

A glance at the papers connected with the case shews that the contention of the city corporation is incorrect. The tax-bill which these moneys represent is in evidence as exhibit 1, and is headed "1924, City of Toronto taxes, based on assessment made in 1923."

The by-law under which the tax levy for this amount was actually imposed is by-law No. 9942, exhibit 8, which was passed on the 28th February, 1924. It recites the necessity of raising by a tax upon the ratable property in Toronto a sum of money for the public uses of the city "for the current year," while sec. 1 thereof states that the assessment made in 1923 for the year 1924 was thereby adopted as the assessment for the City of Tor-

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1929. to be raised, levied, and collected. The by-law then provides for  
SIFTON the raising, levying, and collecting taxes on the property and  
v. income on such roll of the various sums and amounts required,  
CITY OF by means of taxation thereon.  
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The law on the subject appears to be found in the Municipal Act of 1922, secs. 249, 297, and 300, and in the Assessment Act, R.S.O. 1914, ch. 195, as amended by the Assessment Amendment Act, 1922, 12 & 13 Geo. V. ch. 78. Section 11 of the last mentioned Act states that the income to be assessed "shall be the *amount* of the income received during the year ending on the 31st of December then last past."

Under sec. 249 of the Municipal Act of 1922, the jurisdiction of every council is confined to the municipality which it represents. By secs. 297 to 300 those powers, so far as assessment and taxation are concerned, are to assess and levy on the whole ratable property *within the municipality* a sum sufficient to pay all debts of the corporation falling due within the year and that one by-law or several by-laws for assessing and levying the rates may be passed as the council deems it expedient; the rates imposed for any year to be deemed to have been imposed and to have been due on and from the 1st January of such year. If there is a shortage in the amount collected the deficiency may be made up out of any unappropriated fund or deducted from the estimated sums.

It seems to me clear that under these provisions that by-law, 9942, carries out the provisions of the statute and that the moneys in question are those which the city sought to recover as income taxes for 1924, because in that year the by-law for assessing and levying rates was passed on the 28th February, 1924, and, pursuant to the Municipal Act, such assessment and taxation were based *pro tanto* on the amount of the plaintiff's income for 1923. The plaintiff, having, before the by-law was passed, removed out of the municipality, was no longer subject to the jurisdiction of the council, nor was his income for the year 1924 unless he earned or received it within the city of Toronto: *City of Ottawa v. Keefer*, 54 O.L.R. 86.

Notwithstanding the provisions of the Assessment Act, I do not think that the mere appearance on the assessment roll of the name of an individual and of his income is sufficient to make him liable for income tax unless and until the by-law required by the Municipal Act is passed, as the provision in sec. 297 is, that the council shall in each year *assess and levy* on the whole ratable



property *within the municipality*. This includes the income returned by the plaintiff, as it appears in the assessment roll, but when he removed from the municipality, before the taxation was imposed by by-law, the amount of his income, though appearing on the assessment roll, disappeared as a taxable property, and was no longer properly counted as part of "the ratable property in the city of Toronto" upon which the by-law imposed a tax unless it was in fact received in Toronto by the plaintiff. The roll is *primâ facie* evidence merely: R.S.O. 1927, ch. 238, sec. 98(1).

The present subsec. 3 of sec. 98 of R.S.O. 1927, ch. 238, introduced in 1917, was in force in its present form in 1922, 1923, and 1924. I do not think that this subsection renders ineffective sec. 258 of R.S.O. 1927, ch. 233 (1922, ch. 72, sec. 249), or extends the territorial jurisdiction of the council. It means, as I read it, that every person assessed and on the roll when finally revised and settled is liable for any rates which may properly be levied upon such assessment roll notwithstanding removal out of the municipality before the tax is imposed. It covers the case of removal of the person assessed where income is received within the municipality from which he has removed.

In this case I think that the council could not properly levy taxation upon the plaintiff in February, 1924, as he was then neither a resident in Toronto nor did he receive any income therein, and that the question is not concluded by the fact that the appellant's name is found on the roll. See *McLeod v. City of Windsor*, [1923] S.C.R. 696, 703.

But it is urged that the plaintiff might have appealed to the Court of Revision, and, not having done so, is concluded by what appears upon the roll.

Section 118 of R.S.O. 1914, ch. 195, as amended in 1917 and again in 1922 (ch. 78, sec. 26), provided that the Court of Revision on petition before the 1st July in the year following the adoption of the assessment by the city council might, in cases of gross or manifest error in the roll, "remit or reduce the income taxes of persons" who had been assessed in respect of income. But this right was always subject to such by-laws as the city council might enact in this behalf. An appeal was given to the County Court Judge. In 1924 a written notice was required before the Court of Revision could receive and decide on an application. This amendment came into force on the 17th April, 1924. There was therefore a right to go to the Court of Revision for remission of income taxes in the case of this plain-

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tiff at any time during 1924 or until the 1st July, 1925, and an appeal lay to the County Court Judge from their decision. But at no time during 1923, when the assessment was determined and the roll finally revised, had the plaintiff here any ground of appeal, for he was during that year a resident of Toronto and assessable for income of 1924 on the basis of that of 1923. Consequently his only right of complaint or appeal was under sec. 118, as I have indicated, and on that appeal the County Court Judge had power to decide whether he was assessable (R.S.O. 1914, ch. 195, sec. 82), his authority being as extensive as that of a Divisional Court, as to which see *Re Blackburn and City of Ottawa* (1924), 55 O.L.R. 494. But, unless I am right on the construction of sec. 98, such an appeal would be blocked by its provisions. An appeal to any court on the ground of removal from the municipality would be useless if the roll in such a case were conclusive.

I do not think this decision conflicts with other judgments of the Appellate Division, namely *Re Palmer and City of Toronto*, 26 O.W.N. 84; *City of Ottawa v. Keefer*, 54 O.L.R. 86; *Re Fox and City of Windsor*, 57 O.L.R. 243; *Village of Hagersville v. Hambleton*, 61 O.L.R. 327; though I think it is not quite reconcilable with that of my brother Masten in *City of Toronto v. Quebec Bank*, 40 O.L.R. 544. In the *Hagersville* case the appellant contended that he did not live in Hagersville in 1926, which was the year for which he was assessed, and the County Court Judge held that he was so resident. He had and exercised his right of appeal against the current year's assessment.

I would therefore allow the appeal and give judgment for the plaintiff for the amount in question, namely, the sum of \$176.46, with interest at 5 per cent. since the 9th day of March until judgment, together with the costs of the action and appeal.

GRANT, J.A.:—The facts are sufficiently set out in the opinions of my Lord and of Hodgins, J.A., which I have been permitted to read.

I agree that the taxes collected from the plaintiff were in respect of the year 1924 and not 1923, although the assessment roll was prepared in 1923 and adopted by the municipal council of the defendant corporation by by-law passed in February, 1924, as the assessment roll to serve for the latter year.

The question involved is whether or not the plaintiff, having been a resident of the defendant municipality for and during the year 1923, and having left the municipality in December of that

year, and therefore not having been a resident therein at any time during the year 1924, could be made to pay taxes in respect of his income for the later year.

The general jurisdiction of a municipality is given by sec. 249(1) of the Consolidated Municipal Act of 1922, being 12 & 13 Geo. V. ch. 72, and is in these words:—

“249.—(1) Except where otherwise provided, the jurisdiction of every council shall be confined to the municipality which it represents and its powers shall be exercised by by-law.”

The jurisdiction of the council of the defendant municipality therefore, unless it is otherwise provided, is limited by the bounds of that municipality.

The power to assess and levy upon the whole ratable property within the municipality a sum sufficient to pay the debts of the corporation falling due within the year is given by sec. 297 of the same statute, and further provisions with reference to the same matter are to be found in secs. 298, 299, and 300.

It is provided by the Assessment Act, R.S.O. 1914, ch. 195, sec. 12(1), that “every person assessable in respect of income under section 11 shall be so assessed in the municipality in which he resides,” etc. It follows therefore from the provisions of sec. 249(1) of the Municipal Act and sec. 12(1) of the Assessment Act that, as the plaintiff was not, in the year 1924 or during any portion of it, a resident of the defendant municipality, he was not assessable thereby in respect of income for the year 1924, unless it is otherwise so provided. The effect of sec. 12(1) (*supra*) was considered in *City of Ottawa v. Keefer*, 54 O.L.R. 86, where the *Nantel* case, 51 O.L.R. 269, is explained.

Provision is made by certain sections of the Assessment Act, R.S.O. 1914, ch. 195, for the preparation and revision of the assessment roll during the year for which the taxes are to be levied and collected; but by sec. 56 power is given, in cities, towns, and villages, to the council to take the assessment later in the year, followed by the holding of a court of revision for hearing appeals and also appeals from it to the County Court Judge; and the section (subsec. 1) goes on to provide “and the assessment so made and concluded may be adopted by the council of the following year as the assessment on which the rate of taxation for said following year shall in such case be fixed and levied; and the taxes for such following year shall in such case be fixed and levied upon such assessment.”

By subsec. 3 of the same section it is provided that in any case in which an assessment has been made under the earlier sec-

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tions of the statute—that is, in the ordinary manner for taxation for the year during which the assessment was made—the council, if they deem it advisable to adopt the provisions of sec. 56, may, for that purpose, adopt the assessment roll previously made and revised in such year, and in such case such assessment roll is declared to be subject to revision in the manner provided by subsec. 1. As I read subsec. 3, it has no application to the case at bar.

Section 83 of the same statute declares specifically “that the Court of Revision, the County Judge, the Ontario Railway and Municipal Board, and every Court to which and every Judge to whom an appeal lies under this Act have jurisdiction to determine not only the amount of any assessment, but also all questions as to whether any persons or things are or were assessable or are or were legally assessed or exempted from assessment.” Apparently this section was enacted in order to overcome the effect of the decision of the Judicial Committee in *Toronto Railway Co. v. Toronto Corporation*, [1904] A.C. 809. This section was considered by the Second Divisional Court in *Village of Hagersville v. Hambleton*, 61 O.L.R. 327; and, although the facts in that case were not on all fours with those of the case at bar, yet opinions were expressed by members of that Court which bear upon the question now to be determined. I think it clearly appears from the reasons for judgment given in the report that, in the case of at least a majority of the members of the Court, this section 83, by establishing certain statutory tribunals to which successive appeals might be taken, had conferred upon such tribunals an exclusive jurisdiction, and that, whether or not any appeal had been taken to such tribunals in any case, the person assessed had no recourse, by ordinary action, to the courts of law in the Province. As I read his opinion, this is expressly stated by Middleton, J.A., with whom Orde, J.A., agreed, and is, I think, clearly stated by Riddell, J.A., and Masten, J.A., in their several judgments. The authorities upon which such opinions were based are stated therein and do not require repetition here. I am of opinion that the above is the effect of that section of the statute.

There remains to consider the question whether or not the general provision regarding the limitation of the jurisdiction of the municipal council within the bounds of the municipality has been modified or altered in respect of the present case.

By sec. 9 of ch. 45 of the Ontario statutes of 1917, the then sec. 95 of the Assessment Act was amended by adding subsec. 3,



which is now a part of sec. 98 of ch. 238 of R.S.O. 1927, and reads as follows:—

“(3) Subject to the provisions of section 118 (now 121) every person assessed in respect of business or income upon any assessment roll which has been revised by the Court of Revision or County Judge shall be liable for any rates which may be levied upon such assessment roll notwithstanding the death or the removal from the municipality of the person assessed or that the assessment roll had not been adopted by the council of the municipality until the following year.”

The former sec. 118, now 121, contains provisions for authorising the Court of Revision to remit or reduce taxes under special circumstances, but does not contain any provision which bears upon the question now involved.

If I rightly apprehend the effect of this subsection, it means that where the assessment roll has been revised by the Court of Revision or County Court Judge, a person assessed thereon for income is liable for the taxes which may be levied thereon notwithstanding the death of the person assessed or his removal from the municipality or that the assessment roll was adopted for the following year. In other words, applying the provisions to the facts of the case at bar, the plaintiff having been assessed in respect of income for 1923 upon the assessment roll, which was revised by the Court of Revision or County Court Judge, was liable for the taxes levied upon such assessment roll notwithstanding the fact that he moved his residence from the municipality, and the further fact that the assessment roll was not adopted until the following year.

It seems to me, therefore, that the combined effect of sec. 56(1) of R.S.O. 1914, ch. 195, which authorises the council in 1924 to adopt the assessment made in 1923 as the assessment on which the taxes for 1924 were to be and were fixed and levied, and this subsec. 3 of sec. 98 of the present Act, which makes the person assessed in respect of income upon the assessment roll revised in 1923 liable for taxes levied on such a roll notwithstanding his removal from the municipality and notwithstanding that the roll was not adopted until the following year, is to fasten conclusively upon the plaintiff in this action liability for the amount of the income tax in question in these proceedings, and that, by virtue of sec. 83 (*supra*), this Court has no jurisdiction, in a special action, to entertain a claim by the plaintiff to recover the amount of income tax so paid.

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I have been much troubled by the reflection that, in a case such as the present, where the assessment roll was revised in 1923, and adopted in 1924, the plaintiff is held liable for income tax without any right of appeal in 1924. It is quite true that he did not appeal in 1923, when the assessment roll was being revised, but in that year he had no ground for appeal; whereas in 1924, when he had a perfectly good ground for objecting to his assessment, no right of appeal is given by the statute.

I confess frankly that my mind is not free from doubt upon the question, but I cannot see any escape from the above interpretation of what appears to me to be the plain language of the statutory provisions. The responsibility for condemning persons in the plaintiff's position to the payment of income tax, without any right of appeal in the year in respect of which the taxation is imposed, rests with the Legislature and not with the Court.

As the question is one of great difficulty, I do not think there should be any costs of this appeal, which, in my view, should be dismissed without costs.

*The Court being divided, the appeal was dismissed, but it was ordered that there should, as between the parties, be no costs of the action or of the appeal.*

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[APPELLATE DIVISION.]

1929. RE FORD MOTOR CO. OF CANADA LTD. AND TOWN OF FORD CITY.  
 Jan. 14. *Assessment and Taxes—Exemption—Machinery—Fixtures—Exception—Crane Used for Moving Coal to Supply Power in Manufacturing Plant—Assessment Act, R.S.O. 1927, ch. 238, sec. 4(19)—Installation not for Benefit of Land—Chattel.*

A crane upon the premises of a manufacturing company was assessed by the municipality, upon the view that because the crane was used for the purpose of moving coal, and the coal was used to supply power in the company's plant, the crane was not exempt from assessment under the Assessment Act:—

*Held*, that what is excluded from the exemption, by sec. 4 (19) of the Act, of "all fixed machinery used for manufacturing or farming purposes," is machinery for the production of motive power and the structures and appliances of companies authorised to supply motive power; and, the exception not applying to the crane, if it was a fixture and so realty, it was exempt.

*Held*, also, that the crane was installed for the purpose of its effective operation, and in no way for the benefit of the land as land, and so for the purposes of assessment it remained a chattel. *Re City of Ottawa and Ottawa Electric Railway Co. (1922)*, 52 O.L.R. 664, followed.

AN appeal by the company from an order of the Ontario Railway and Municipal Board affirming the assessment of the company with respect to a Gantry crane upon its premises.

1928-9.

RE FORD  
MOTOR Co.  
OF CANADA  
LTD. AND  
TOWN OF  
FORD CITY.

November 20, 1928. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

*H. L. Barnes*, for the appellant company, argued that the travelling crane which had been included in the assessment of the company's property could not, from its very nature, be realty: *Stuck v. T. Eaton Co.* (1902), 4 O.L.R. 335. Being a chattel, it was not within the Assessment Act, R.S.O. 1927, ch. 238, and therefore not assessable. In any event, if the crane was realty, it was used by the appellant company for the production or supplying of motive power for the company's own use, and not generally, as contemplated by the Act, and therefore it came within the exemption provided by sec. 4(19).

*B. H. Furlong*, for the respondent town corporation, submitted that the crane was a structure placed upon the land and therefore realty within the meaning of sec. 1(h) (4) of the Act. Even assuming that it was not realty, it came within the exception in sec. 4(19), and was therefore assessable.

January 14, 1929. The judgment of the Court was read by MIDDLETON, J.A.:—An appeal from the order pronounced by the Ontario Railway and Municipal Board on the 28th June, 1928, dismissing an appeal from the order of the Senior Judge of the County Court of the County of Essex, affirming a decision of the Court of Revision upon an assessment appeal, in so far as the order in review affirmed the assessment with respect to a Gantry crane on the premises of the appellants.

Two distinct questions are raised upon the appeal: First, the crane is said to be a chattel and therefore not assessable under the provisions of the Assessment Act. In the alternative it is said that, if the crane is a fixture and so realty, it is exempt from taxation under the provisions of sec. 4(19) of the Act.

I prefer to deal with these questions in their inverse order.

Prior to the passing of the Assessment Act of 1904, all property, real and personal, was subject to assessment. By that Act personal property ceased to be liable to assessment, and, in lieu of the assessment on personal property, there was substituted a business assessment, fundamentally based upon the value of the land actually occupied in connection with the business which forms the subject-matter of the assessment.



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The effect of this change was to exempt from taxation all machinery used in connection with a business carried on, unless the machinery had become land for the purpose of assessment, regard being had to the provisions of the interpretation clause sec. 1 (*h*) (4), which made "land" cover, for the purpose of assessment, "all . . . machinery and fixtures, erected or placed upon, in, over, under, or affixed to land."

In furtherance of the policy underlying this Act, there is the additional provision found in sec. 4(19), which, notwithstanding the provision quoted, exempts from taxation "all fixed machinery used for manufacturing or farming purposes," thus according to fixed machinery the same exemption from taxation that had resulted in the case of chattel machinery by reason of the exemption of personal property.

To this exemption there are, however, attached, certain exceptions. The clause embodying these exceptions is exceedingly complicated and difficult of interpretation, and its interpretation has been somewhat further confused by the interjection into it from time to time of various amendments. None of these amendments is material for the purpose now under discussion. I should therefore refer to the section in its original form rather than in the amended form in which it is found in the present statute.

It is provided (Assessment Act, 1904, 4 Edw. VII. ch. 23, sec. 5(16)), that the exemption granted to fixed machinery used for manufacturing or farming purposes shall not apply to (*a*) fixed machinery used for the production or supplying of motive power, nor (*b*) to machinery used by a railway company or by a person authorised to construct or operate on a highway a tramway or structure for the purpose of conducting steam, heat, water, gas, oil, or electricity for the supply of water, light, heat, or power. I have not quoted the section as it stands, but have eliminated words not now material, and inserted the separating letters (*a*) and (*b*) for the purpose of indicating what I think is the true meaning of the section. More shortly, that which is excluded from the exemption is machinery for the production of motive power and the structures and appliances of companies authorised to supply motive power.

The courts below have taken the view that because this crane is used for the purpose of moving coal, and the coal is used to supply power in the plant of the Ford company, the crane ceases to be exempt. I do not think this is what the section provides, or was intended to provide.



If I am correct in this view, it becomes unnecessary to determine whether this crane should be regarded as "machinery and fixtures, erected or placed upon . . . or affixed to land." At present I am inclined to think that it is chattel property within the meaning of this Act.

The Second Divisional Court had before it a somewhat similar problem in the case of *Re City of Ottawa and Ottawa Electric Railway Co.* (1922), 52 O.L.R. 664. Mr. Justice Rose, in giving the opinion of the Court, points out that the question of determining whether a machine has become part of the realty for the purpose of assessment is very different from that which arises where the problem is based upon some special relationship, e.g., vendor and purchaser, mortgagor and mortgagee, landlord and tenant, and that when the question is one connected with assessment the test to be applied is rather whether the intention is to improve the land, as when a central heating plant is installed, and that (p. 674) "if the intention is to put the machine in a place where it can conveniently be used as a machine, that is quite another thing. . . . It is my opinion that the pieces of apparatus in question have continued to be chattels."

This machine was installed for the purpose of its effective operation, and in no way for the benefit of the land as land, and so for the purposes of assessment it remained chattel property.

On both grounds I think the appeal succeeds, and the judgment below should be reversed. The appellant here will have its costs in this Court. As many other questions were involved in the decision in the Court below, and no costs were given by the Railway Board, I make no other order concerning costs.

*Appeal allowed.*

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[APPELLATE DIVISION.]

O'REILLY v. CANADA ACCIDENT AND FIRE ASSURANCE CO. LTD.

1929.

*Insurance (Automobile)—Destruction of Motor-car by Fire on Highway—Car Taken out by Person Prohibited by Special Clause Endorsed on Policy from Operating—Meaning of "Operated"—Car Driven by another at Time of Fire—Control—Statutory Condition 5—Whether Varied by Special Clause.*

Jan. 14.

The judgment of KELLY, J., 62 O.L.R. 654, was reversed.

Held, that the word "operated," in the clause of the defendants' policy providing that they should not be liable if the car insured was "operated" by the insured's son T. R., meant having charge

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of it as driver, putting the car in motion, and supervising its working; and at the time of the accident T. R. was not regulating and controlling the management of the machine as a machine, even though he had from the back seat full control over the choice of route.

*Per* HODGINS, J.A.:—The statutory condition 5, Insurance Act, R.S.O. 1927, ch. 222, sec. 175, was not varied by the special clause in regard to T. R., which was another stipulation or covenant which defined or limited the risk insured against; and the exception or condition did not come into effect, the car not being operated by T. R. when the accident happened.

*Curtis's and Harvey (Canada) Ltd. v. North British and Mercantile Insurance Co.*, [1921] 1 A.C. 303, and *W. Malcolm Mackay Co. v. British America Assurance Co.*, [1923] S.C.R. 335, referred to.

AN appeal by the plaintiff from the judgment of KELLY, J., 62 O.L.R. 654.

December 23, 1928. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

T. N. Phelan, K.C., for the appellant, argued that the clause in the policy relied on by the defendants is a condition limiting liability on a risk which has already attached, and because it is not in red ink, in accordance with the provisions of the Insurance Act, R.S.O. 1927, ch. 222, sec. 177, it is invalid. In any event there was no violation of the clause, inasmuch as the car was not "operated by the insured's son Terence O'Reilly," within the prohibition of the policy, and the trial Judge erred in finding that it was. He confused "control" with "operation." Terence was in control of the car within the broad meaning of the term, but he was in no sense of the word "operating" the car within its primary meaning. Reference to *O'Connell v. New Jersey Fidelity and Plate Glass Insurance Co.* (1922), 193 N.Y. Supp. 911; *Williams v. Nelson* (1917), 228 Mass. 191; *W. Malcolm Mackay Co. v. British America Assurance Co.*, [1923] S.C.R. 335; *Fidelity-Phoenix Fire Insurance Co. of New York v. McPherson*, [1924] S.C.R. 666; *Palatine Insurance Co. v. Gregory*, [1926] A.C. 90.

P.E.F. Smily, for the defendants, respondents, contended that the trial Judge was right in holding that the son Terence was operating the car within the meaning of the prohibitive clause in the policy. The Court is not compelled to accept the narrow meaning of the word; and where "operate" is used as an alternative in the policy it is clearly an extension of the term "drive" and meant in its wider and broader meaning. While in the back seat, Terence was in control and direction of the car in such a way as to be operating it. Reference to *Pratt v. Patrick*, [1924]

1 K.B. 488; *Houseman v. Karicofe* (1918), 201 Mich. 420. With regard to the validity of the clause, it is not a condition which needs to be in red ink within the provisions of the Act. It is merely a limitation of the subject of the contract: *Curtis's and Harvey (Canada) Ltd. v. North British and Mercantile Insurance Co.*, [1921] 1 A.C. 303.

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1923.

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January 14, 1929. MIDDLETON, J.A.:—An appeal from the judgment of Mr. Justice Kely, reported 62 O.L.R. 654, where the facts are clearly stated.

Mr. Phelan, for the plaintiff, bases his argument upon two entirely independent grounds. First, he contends that the clause in the policy which was fatal in the Court below is invalid by reason of the provisions of the Insurance Act, and, secondly, he contends that there has been no violation of the clause, and that at the time of the accident the car was not "operated by the insured's son Terence O'Reilly," within the meaning of the policy.

Assuming the validity of the clause, it appears to me that that which was intended to be excepted from the risks assumed was the risk incident to the "operation" of the car by Mr. Terence O'Reilly, using that term in its strict and primary sense, the risk flowing from his having charge of it as driver, putting the car in motion, and supervising its working. At the time of the happening of the accident he was not regulating and controlling the management of the machine as a machine, even though he had from the back seat full control over the choice of route, etc. *Quoad* the actual driver of the car he stood in no different relation to the young man operating than the owner of a car stands towards his chauffeur.

The meaning of the policy may be tested by hypothetical cases. Had Mr. O'Reilly himself been in the back seat and Mr. Terence O'Reilly at the wheel and the accident had occurred, there could have been no recovery, because Terence was "operating" in the sense that I attribute to the expression used in the policy, and Mr. O'Reilly, although in one sense operating, was not operating within the meaning of the policy. Take another illustration. If Mr. Terence O'Reilly was in the back seat and the car was being driven by his father's chauffeur, an expert and trained man, Terence O'Reilly would not then be operating the car within the meaning of the policy.

This makes it unnecessary to express any view upon the other questions argued.



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The appeal succeeds and the plaintiff should recover with costs throughout.

MULOCK, C.J.O., and MAGEE and GRANT, JJ.A., agreed with MIDDLETON, J.A.

HODGINS, J.A.:—I quite agree that the word “operate” is one of many meanings, ranging from the figurative to the actual. A man may “operate” a fleet of motors by organising a system in which he himself never personally drives or operates a single motor. A railway company operates a railway system, in which only engineers manipulate the machinery of a locomotive. Insurance companies in insuring motors assume liability for them when stationary as well as when in motion. But it is the latter situation which is most prolific of accidents and thus more likely to cause a loss which the company must pay.

When a condition or stipulation is directed to limit the operation by a named individual of a single motor insured by a company, or to exclude the motor so driven from the risk undertaken, the word “operate” would not generally be used to describe its operation in a figurative sense, such as would be the case if the intention was to exclude the direction by that individual of some one else’s control and operation of the machine rather than the actual driving of it by the use of its mechanism. In other words, control and direction only partly describe or apply to the actual operation of a motor, and, if used in a figurative sense, omit the most essential cause of its motion, namely, the personal working and application of its motive power.

In this policy I think the words in question are used primarily in reference to this last mentioned meaning, but if it does generally include control or direction, that by no means excludes its natural, and as I think obvious, meaning in this policy. (See *Witherstine v. Employers Liability Insurance Co.* (1923), 235 N.Y. 168, and *Labrecque v. Donham* (1920), 127 N.E. Repr. 537.

This would be consonant with the sound rule of construction that those who stipulate for an exception should be limited to the narrowest significance of the words used, which, in this case, is that of the driving or mechanical operation by the individual mentioned—otherwise, as in the case of questions put by insurance companies, “the ambiguity would be a trap against which the insured would be protected by courts of law.”

I cannot regard the clause attached to the policy as a condition subsequent, altering or varying the statutory conditions.



The conditions apply, and cannot be varied except when authenticated in the prescribed manner. But, as stated in *Curtis's and Harvey (Canada) Ltd. v. North British and Mercantile Insurance Co.*, [1921] 1 A.C. 303, at p. 312, "any other stipulation and covenant which may define and limit the risk can also receive effect in so far as it does not contradict the statutory conditions which are paramount." This distinction is recognised in *W. Malcolm Mackay Co. v. British America Assurance Co.*, [1923] S.C.R. 335.

The statutory condition relating to the operation of the motor-car insured is number 5, which is as follows (Insurance Act, R. S.O. 1927, ch. 222, sec. 175):—

"RISKS NOT COVERED. 5. The insurer shall not be liable under this policy while the automobile, with the knowledge, consent or connivance of the insured, is being driven by a person under the age-limit fixed by law, or, in any event, under the age of 16 years, or by an intoxicated person."

This is not varied or changed by the endorsement in question, which is as follows:—

"It is hereby understood and agreed that the under-mentioned policy does not cover if the car insured is operated by the insured's son, Terence O'Reilly, and the insured by the acceptance of this policy and this endorsement agreed to this limitation of cover."

This is "another stipulation or covenant which defined or limited the risk" (the word "risk" being obviously used here in the sense of "peril") "insured against." See *per* Anglin, J., in the *Mackay Company* case, at p. 350.

The exception or condition, therefore, did not come into operation in the circumstances of this case, the motor-car not being "operated" by the plaintiff's son when the accident happened.

I would allow the appeal and give the plaintiff judgment for his claim with interest and costs.

*Appeal allowed.*

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## [APPELLATE DIVISION.]

HAY V. LOCAL UNION No. 25 ONTARIO BRICKLAYERS AND MASONS  
INTERNATIONAL UNION

1999.

Jan. 14.

*Trade Union—Unincorporated Body—Action against—Substitution at Trial of Individual Members as Defendants—Rules of Union—Sub-contract for Labour only—Threat to Withdraw Union Workmen—Lawfulness—Absence of Evidence of Malice or of Conspiracy.*

The plaintiff, who was not a member of the defendant Union, took a sub-contract under one T. to supply all the labour (but not the material) required for the brick-work and masonry-work upon a building being erected by T. By a rule of the Union, no member was to be allowed to work on any sub-contract taken from a building contractor where the sub-contract was for labour only. Two members of the Union saw T. and told him that if he did not get rid of the plaintiff the bricklayers working for the plaintiff would be withdrawn, they being members of the Union. The plaintiff, when T. told him this, said he would give up the contract, and did so; subsequently he sued the Union for damages occasioned by the loss of his sub-contract. The two members above referred to and a third were added as defendants at the trial of the action:—

*Held*, that what was done was done for the purpose, not of injuring the plaintiff, but of forwarding or defending the trade of the members of the Union, and notice that the members of the Union would be warned of the situation was not a threat which was unlawful, and did not give any right of action to the plaintiff—there was no evidence of spite or malice or desire to injure, nor of any improper conspiracy or combination, though two members together conveyed the warning.

*Sorrell v. Smith*, [1925] A.C. 700, followed.

*Local Union No. 1562 United Mine Workers of America v. Williams and Rees* (1919), 59 Can. S.C.R. 240, distinguished.

*Semle*, the Union, being unincorporated, could not be sued, and therefore the addition of the individual defendants was incompetent, it being in fact a substitution of defendants for an original defendant against whom no cause of action existed.

AN appeal by Dennis Martell, Albert Pemberton, and Alfred Barrington, defendants added at the trial of the action, from the judgment of the Third Division Court of the district of Thunder Bay (McKAY, Jun. Dist. Ct. J.), in favour of the plaintiff as against these defendants, in an action for damages and an injunction in respect of an alleged illegal conspiracy or combination to injure the plaintiff. The action was dismissed as against the defendant Union, on the ground that, being an unincorporated association, it could not be sued.

December 4, 1928. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

*H. F. Parkinson*, K.C., for the appellants, argued that the intent of the conspirators in cases of this nature determines whether or not an action lies. If the conspirators act with a *bonâ fide* desire to advance or defend the interests of themselves and the other members of their Union and are not actuated by any "wish" to injure the plaintiff, then the plaintiff's damage is *damnum sine injuriâ*. The principle determined in *Allen v. Flood*, [1898] A.C. 1, has been followed and extended by *Bulcock v. St. Anne's Master Builders' Federation* (1902), 19 Times L.R. 27; *Attorney-General of the Commonwealth of Australia v. Adelaide Steamship Co. Ltd.*, [1913] A.C. 781; *Ware & De Freville Ltd. v. Motor Trade Association* (1921), 90 L.J.K.B. 949; and *Sorrell v. Smith*, [1925] A.C. 700. See "Unlawful Molestation," 39 L.Q.R. 193. *Quinn v. Leathem*, [1901] A.C. 495, *Valentine v. Hyde* (1919), 88 L.J. Ch. 326, [1919] 2 Ch. 129, and *Local Union No. 1562 United Mine Workers of America v. Williams and Rees* (1919), 59 Can. S.C.R. 240, are all distinguishable upon the facts. In those cases, the basis of judgment is the malicious attempt to injure the plaintiff. In the case at bar the evidence shews that the threat on the part of the defendants was made in good faith and only for the purpose of enforcing the Union rules as to the conditions under which the members may labour. The appellants do not press the point that they were improperly joined at the trial in an action where no cause of action existed against the original defendant.

*S. A. Shoemaker*, for the plaintiff, respondent, referred to the evidence and argued that the facts of the case brought it within the decision of the Supreme Court of Canada in the case last cited for the appellants.

January 14, 1929. HODGINS, J. A.—Appeal from the judgment of McKay, Junior Judge of the District Court of the District of Thunder Bay, sitting in the Third Division Court of the District. Judgment was given against the individual defendants for \$200 and costs, and the action was dismissed against the Union without costs, on the ground that it could not be sued.

The initial difficulty is that the Local Union, being unincorporated, could not be sued, and therefore that the adding at the trial of the individual defendants was incompetent, it being in fact a substitution of defendants for an original defendant against whom no cause of action existed. This was not pressed at the trial or on the appeal; nevertheless I think the Court is entitled to

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pronounce upon the point, and upon that ground alone the action against the individual defendants should be dismissed.

But, apart from that, the defendants argued on the merits that there was no evidence against them to warrant the judgment, and it seems well to consider this point.

It appears that the plaintiff, who was not then a member of the Local Union, took a contract under one Tocheri to supply all the labour required to do the brick and masonry-work at the rate of \$17 per thousand brick upon a building being constructed by Tocheri. This would have given him, upon the evidence, a profit of about \$3 a thousand.

The plaintiff did not supply any material; part of the material was old brick given by the owner of the building, the rest being supplied by Tocheri. By a rule of the Local Union it is provided (p. 26 of exhibit 2, being the constitution, by-laws, and rules of the Local Union) that "No member or members of this Union shall be allowed to work on any sub-contract taken from a building contractor where the sub-contract is for labour only."

The officials of the Local Union, having been informed of the plaintiff's contract, appointed, pursuant to their rules, an arbitration committee, who interviewed Tocheri. This arbitration committee directed the defendants Martell and Barrington to deal with Tocheri and the plaintiff. They were instructed to tell Tocheri that, in view of this rule, if he did not get rid of Mr. Hay. (the plaintiff), the bricklayers working for the latter would be withdrawn, they being members of the Union.

In carrying out these instructions both Martell and Barrington discussed the matter with Tocheri. Martell's evidence is as follows:—

"Mr. Tocheri said, 'What am I going to do?' I said, 'You can do what you like.' He said, 'If I do that I will get bum bricklayers on the job.' I said, 'You might get as good non-union men as union men.' He said, 'I want Union bricklayers. Union bricklayers for me. I think the only thing for me to do is to get rid of Hay.' We said good-day to him and went away.

"Q. Did you tell him to fire Hay? A. We told him to use his own discretion.

"What did you tell Tocheri? A. I told him I would speak to our Union bricklayers. He said, 'I had better yet rid of Hay.' I said, "Use your own discretion. I am not saying anything about what you should do with Hay."



Barrington's evidence is as follows:—

"We went to the job between 9 and 10 o'clock; saw Mr. Tocheri; Mr. Martell asked him if he had let a contract for the brick-work of this building. At first Mr. Tocheri said no—had no contract. Then we asked him if Mr. Hay was working as a foreman and he said Mr. Hay was running the job for him. I said our Union men couldn't work under a non-union foreman. Then he said, 'He is doing it for so much a thousand.' I said, 'That doesn't conform with our rules and regulations—with the I.U. constitution. Our men would quit working under that contract.' Mr. Tocheri says, 'What can I do?' Mr. Martell said, 'It is entirely up to you what you do. Our men cannot work under that contract.' Mr. Tocheri said he would see Mr. Hay at dinner-time and we were to come back at 2 o'clock and Mr. Tocheri would give us his decision.

"Q. Did Mr. Martell or yourself say anything about threatening to have Hay discharged? A. No.

Q. Did you use the word 'fire'? A. No, sir.

Q. You didn't use the word 'fire' in reference to having Mr. Hay fired? A. No, sir.

Q. Was anything said to the effect that the Union required them to fire Hay? A. No, sir. We told Mr. Tocheri that our men wouldn't be allowed to work under Mr. Hay under that contract.

"Finally we went down to see Tocheri again. Tocheri told us that he had made his decision—that Mr. Hay would have to go. He couldn't get along with non-union bricklayers and that Mr. Hay would have to be dispensed with.

"Q. What was said when Mr. Tocheri announced his decision? A. Mr. Hay said he didn't care. He could go back to the bush and work for himself. He said, 'I can see what it is going to be. I can see where I am going to pay a big fine for hitting you two fellows up.'"

In addition to this, both were cross-examined on what would happen if Tocheri had not decided to cancel his contract with Hay. Martell testifies as follows:—

"What is the policy of your Union? What is their policy with regard to calling a strike? A. We don't exactly call a strike. We tell the men they are working contrary to our rules and if they want to come off they can use their own discretion.

"If you knew it, what would happen if he had not got

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rid of Hay ? A. We wouldn't have done nothing. The bricklayers would have done it. They would have quit the job.

"Q. If he hadn't got rid of Hay the Union bricklayers would have quit the job? A. Yes, and he knew it and Hay knew it.

"When you found out that Tocheri didn't know about that ruling, did you notify the bricklayers? A. We didn't have to. Mr. Tocheri asked us to see him at 2 o'clock. We met him at 2 o'clock and he said Mr. Hay was off the job.

"Q. Did you notify the bricklayers? A. No."

Barrington, on the same subject, says:—

"Q. What notification would you have made to the bricklayers on the job? A. Just tell them they were working contrary to Union rules. That was all that was necessary.

"Q. Is it your duty, or is it part of the duty of the Union, to call men off a job? A. Not call them off the job. Just inform them that they are working contrary to rules."

The reason given by Pemberton, the secretary of the Local Union, for the rule is as follows:—

"Q. What is the purpose of these provisions in the International rules? A. The members of our organisations prefer to work under contractors. We figure a man who comes along and takes the work for labour only is not a *bonâ fide* contractor

"Q. In what way would that work to the prejudice of your Union? Whatever profits he makes he has to make out of the men themselves, and that sort of work is generally rushed and the work is scamped—several things.

"Q. And you say it is better for the members to work only for the contractors? A. Yes."

Both Martell and Barrington deny that any threats were made or that Mr. Tocheri was told that he would have to "fire" Hay or that they would call a strike.

Tocheri says that the president and secretary approached him and stated that they were going to call all the men off the job—call a strike—and he said he would let them know in the afternoon and then told Mr. Hay. Hay said he would give up the contract and he was paid the same day; that he really did the cream of the work; that the president and secretary told him to let Mr. Hay go and it would be better, so that they would not have to call the men off the work. He adds that "Hay understood the position he was in and said, 'I think it is up to me to go. I

think I had better quit.' Once he understood the position he was in, he kind of realised he had to go."

I have been unable to find that any of the defendants used the word "strike," and I read Tocheri's evidence as meaning that the words used were "call the men off the job," which he translates or compresses into the word "strike."

I am quite unable to see what foundation there is for a finding that the individual defendants were guilty of conspiracy or combination to injure the plaintiff as found by the learned trial Judge.

The case of *Local Union No. 1562 United Mine Workers of America v. Williams and Rees*, 59 Can. S.C.R. 240, which he refers to as a somewhat similar case, is not on all fours with this. Mr. Justice Anglin, p. 254, says:—

"The evidence, however, convinces me that, acting through authorised agents, the Local Union as a body brought about the dismissal of the plaintiffs by threatening a general strike should they be retained in the company's employment. . . . I think it is also a fair inference from all the circumstances in evidence that a desire to prevent the plaintiffs continuing in the employment of the Rose-Deer Company and to punish them for remaining non-union men after the re-establishment of Local Union 1562, in 1916, and their refusal to join it when it was first suggested to them to do so actuated its conduct in seeking their dismissal rather than any genuine wish to promote the interests of trades-unionism generally or its own immediate welfare."

And he proceeds to say (p. 255) that the action of the Local Union's committee amounted to a coercive threat and was therefore an unlawful means taken to interfere with the plaintiffs' employment, the use of which, damage having ensued, constituted in itself an actionable wrong.

That case, therefore, depends for its force upon the fact that a coercive threat was used to cause a general strike, should the men be retained in the company's employment.

It is unnecessary in these circumstances to discuss some of the questions argued before us. But I may add that I think it is quite competent for members of a Union (or the Union itself) who find that their fellow-members are employed on a contract which their rules do not sanction, the rule being founded upon business reasons and good sense, to warn the contractor and his sub-contractor that they will be obliged to inform the men that they are working contrary to that rule of their Union, and that

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if, in consequence, the contractor and sub-contractor agree to the cancellation of the contract, or the sub-contract is cancelled, the warning is quite within their legal rights, and is not a wrongful act which is actionable, even if the warning is conveyed by two or three individual members of the Union or by the Union's officials.

In *Sorrell v. Smith*, [1925] A.C. 700, in which all the earlier and cognate cases were considered and reviewed by the House of Lords, it is laid down that if the real purpose of the combination is not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed, and no action will lie although damage to another ensues, provided the purpose is not effected by illegal means. And further that a threat to effect a purpose which is in itself lawful gives no right of action to the person injured thereby.

In this case I think what was done was done for the purpose, not of injuring the plaintiff, but to forward or defend the trade of the members of the Union, and that notice that the members of the Union will be warned of the situation is not a threat which is unlawful, and does not give any right of action to the person injured. I find no evidence of spite or malice or desire to injure, nor of any improper conspiracy or combination, though two members together conveyed the warning.

The appeal should be allowed, and the action dismissed without costs. Costs of the appeal, however, will have to be paid by the plaintiff.

I may refer to some of the cases earlier than *Sorrell v. Smith*, as dealing with some of the points argued before us:—

*White v. Riley*, [1921] 1 Ch. 1: "The mere statement to an employer by a number of workmen that they will not work with another workman, and that if that workman is retained in the employer's service they will strike, even where they have knowledge that he cannot dispense with their services, does not, of itself, constitute an unlawful threat, and is therefore not, of itself, actionable."

*Reynolds v. Shipping Federation Ltd.*, [1924] 1 Ch. 28. In this case Sargant, L.J. (then Sargant, J.), held "that as the agreement was entered into not from a malicious desire to inflict loss on an individual or class of individuals, but from a desire to advance the business interests of employers and employed alike by maintaining the advantages of collective bargaining and control, it was not unlawful, and no action for conspiracy was maintainable by the plaintiff."



*Hodges v. Webb*, [1920] 2 Ch. 70: "In the absence of conspiracy or unlawful combination, a firm or even emphatic statement by one person that unless the person whom he is addressing consents to the adoption of a particular course which he can lawfully take, the speaker will do that which he is lawfully entitled to do, is not a threat for which the speaker can be held liable at law."

*Davies v. Thomas*, [1920] 2 Ch. 189: "An association of traders in a particular district were bound by a rule which provided that 'on an employee leaving an employer, who is a member of the association, the employer shall (if so desirous) report the same to the secretary, who shall advise all the members, and no other member of the association shall employ or supply him for 12 months.' The plaintiff, a traveller, left the employment of W., the secretary of the association, and entered the service of H., another member, to whom he transferred customers whom he had secured for W. W. called a meeting of the association and reported the matter. At the meeting H. was persuaded by W. and other members to give the plaintiff notice to terminate his employment. His dismissal was not obtained by any illegal means, i.e., coercion, intimidation, threats or undue influence.

"In an action by the plaintiff against W. and the other officials of the association for damages and an injunction to restrain them from interfering with him in his calling:—

"*Held*, that upon the facts of the case and applying the principle of *Allen v. Flood*, [1898] A.C. 1, the plaintiff had no cause of action against the defendants."

MULOCK, C.J.O., and MAGEE and GRANT, JJ.A., agreed with HODGINS, J.A.

MIDDLETON, J.A.:—An appeal from the judgment of his Honour Judge McKay, pronounced on the 2nd November, 1928, upon the trial of an action in the Third Division Court of the District of Thunder Bay, whereby he awarded against the individual defendants \$200 damages and costs, for that they conspired together with intent to injure the plaintiff, and did injure him in that by reason of their conduct he lost a contract in the evidence referred to.

The action was originally brought against the Local Union, but at the trial it became quite apparent that the action as against this body must fail. Upon the application of the plaintiff's counsel the three individual defendants were added and judgment was

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App. Div. in the end given against them. It is quite probable that this  
1929. procedure could not be justified, but upon this appeal the de-  
HAY fendants did not take the objection and upon the argument ex-  
v. pressly waived it.

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One of the clauses of the constitution of the Bricklayers and  
Masons Union No. 25 provides that "no member . . . of this  
Union shall be allowed to work on any sub-contract taken from a  
building contractor where the sub-contract is for labour only."

On the 20th August, 1928, one Tocheri, who had a contract  
for the erection of a building, entered into an agreement with  
one Hay by which Hay undertook to do all the work in connection  
with the brick-work, stone-work, and masonry-work under the  
contract, at the price of \$17 per thousand brick. Hay entered  
upon the performance of his contract, when the defendants, who  
held office in the Union, saw Tocheri and told him that the  
contract that he had made with Hay was objectionable to the  
constitution of the Union, and that if it was adhered to they  
would call a strike of all Union men working upon the job. Tocheri  
said that he knew nothing about the rules of the Union and  
would speak to Mr. Hay. He then told Hay what had happened  
and Hay said he would give up the contract, whereupon he was  
paid for the work done to date. It is reasonably plain from the  
evidence of Tocheri that, although Mr. Hay apparently voluntarily  
relinquished his contract, his action really was the result of com-  
pulsion exercised by Tocheri as a direct consequence of the intim-  
ation received from the defendants. This was their intention,  
for Pemberton thus puts the situation: "We discussed the matter,  
decided we could not allow Mr. Hay to continue that job if he had  
the contract for labour only."

In all that was done by the defendants there was not, so far  
as I can see, any intention whatever to injure the plaintiff. They  
were acting honestly in upholding a policy that had been deter-  
mined upon by the Union. As put by one of the witnesses: "The  
members of our organisation prefer to work under contractors.  
We figure a man who comes along and takes the contract for  
labour only is not a *bonâ fide* contractor. The Union is preju-  
diced, because whatever profits he makes he is to make out of the  
men themselves, and that sort of work is generally rushed and the  
work is scamped."

Upon the evidence the learned Judge in a very careful judg-  
ment has decided that the defendants are liable in damages, and  
he adopts the language of the Supreme Court of Canada in *Local*

*Union No. 1562 United Mine Workers of America v. Williams and Rees*, 59 Can. S.C.R. 240:—

"The dismissal of the plaintiffs was the direct and intended outcome of the action of the Local Union's committee, such action amounting to a coercive threat and being therefore an unlawful means taken to interfere with the plaintiffs' engagement, the liability of the Local Union if suable is established, and the delivery of the message of the committee to the manager of the company, having regard to all the circumstances, makes them personally liable towards the plaintiffs."

Unfortunately the case was argued and disposed of without any reference to the decision of the House of Lords in *Sorrell v. Smith*, [1925] A.C. 700, and he was left to face what Lord Cave describes as the "famous trilogy of cases" in the House of Lords without the guidance afforded by its last deliverance.

Lord Justice Scrutton in *Ware & de Freville Ltd. v. Motor Trade Association*, [1921] 3 K.B. 40, at p. 66, said: "The only tribunal which can hope to bring order into chaos is the House of Lords itself;" and it is therefore not to be wondered at that the decision is in conflict with the conclusions arrived at in the case referred to.

Lord Cave ([1925] A.C. at p. 712) deduces from a careful examination of the authorities two propositions of law which are accepted by all the other Lords, although they differ on matters not material to the present controversy. These propositions are: (1) "A combination of two or more persons wilfully to injure a man in his trade is unlawful, and if it results in damage to him, is actionable." (2) "If the real purpose of the combination is not to injure another but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues." The distinction between these two classes of cases is stated to be that in cases of the former class "there is not, while in cases of the latter class there is, just cause or excuse for the action taken." The action failed because the defendants acted as they did for the sole purpose of protecting their own trade and were not actuated by spite against the plaintiff, nor had they any desire to injure him.

This authority is conclusive in the defendants' favour, for there is no question that all that was done was done by the defendants in the honest belief that what they were doing was in their own interest and in the interest of the Union which they represented, and without any intention to inflict any injury upon the plaintiff.

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MASONS

INTERNA-

TIONAL

UNION.

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The case of *Hardie and Sons Ltd. v. Chilton*, [1928] 2 K.B. 306, a decision of the Court of Appeal, is to the same effect.

These two cases also establish the proposition that a threat to effect a purpose which is in itself lawful is insufficient to found a right of action.

For these reasons the appeal should be allowed and the action should be dismissed, both with costs.

*Appeal allowed.*

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[APPELLATE DIVISION.]

1929.

KIMNIAK V. ANDERSON.

Jan. 14.

*Execution—Sale under Fi. Fa. of Interest in Land of Execution Debtor—Equitable Interest of Trustee—Assignee of Interest of Purchaser under Agreement for Purchase of Land, where Price not Paid in Full—Nature of Interest—Land to Become Trustee's on Fulfilment of Trust—Execution Act, secs. 8, 34.*

C., who had an interest in certain land as purchaser from W., the full price not having been paid, assigned his interest to the plaintiff upon trust that the latter should support C. and his wife for the remainder of their lives and on their death pay all their debts and funeral expenses, whereupon the trust should cease and the plaintiff should be entitled to all the interest of C. in the property free from any trust; and the plaintiff agreed to pay to W. the balance of the purchase-price:—

*Held*, that C.'s equitable interest as a purchaser, if transferred to the plaintiff, gave the latter no estate in the land save to the extent to which a court of equity would give C. specific performance of his agreement with W., and that interest would be taken by the plaintiff as a trust estate; and would not be saleable under a writ of *fiери facias* against the plaintiff's lands.

C. and his wife were entitled to have their interest held by the plaintiff until the trust should be completely performed; and a sale to a third person would deprive them of their security, the transfer of which formed the consideration for the trust and its obligations.

Sections 8 and 34 of the Execution Act, R.S.O. 1927, ch. 112, considered. A trust estate cannot be sold under an execution against a trustee for his own debt, on the ground that, if he fully performs the trust, he will at some future time acquire a beneficial interest in the estate. The defendants, an execution creditor of the plaintiff, and the sheriff in whose hands the execution was placed, were restrained from offering the plaintiff's interest for sale.

Review of the authorities.

AN appeal by the plaintiff from the judgment of WRIGHT, J., dismissing an action brought against Anderson, the Sheriff of the



County of Essex, and one Scharlp, an execution creditor of the plaintiff, for an injunction restraining the defendants from selling the plaintiff's interest in certain land under a writ of *fi. fa.*, on the ground that his interest was not saleable under execution. 1928-29.  
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October 23 and 24, 1928. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and GRANT, JJ.A.

G. A. Urquhart, K.C., for the appellant, contended that his interest in the property was that of a trustee and was not exigible under execution against him personally: Execution Act, R.S.O. 1927, ch. 112, sec. 8. Nor does it come under sec. 34\* of the Act, which applies only to legal and not equitable estates. Even if the interest of the appellant is saleable at all, it is not saleable at the present time because of the trusts to which it is subject. In any event the duty of the sheriff has not been properly carried out. He should have advertised the sale as being of an interest subject to trusts set out. Reference to Armour on Titles, 4th ed., p. 188; *Re Reek and Koven* (1927), 33 O.W.N. 9; *Blackburn v. Gummerson* (1860), 8 Gr. 331; Lewin on Trusts, 13th ed., p. 655; C.E.D. (Ont.) vol. 4, p. 901; *McLean v. Fisher* (1857), 14 U.C.R. 617.

Gordon Waldron, K.C., for the defendant Scharlp, respondent, relied on sec. 34 of the statute and argued that the sheriff could sell a beneficial interest: *In re Prittie and Crawford* (1889), 9 C.L.T. Occ. N. 45.

\* Sections 8 and 34 read as follows:—

8. The sheriff to whom a writ of execution against lands is delivered for execution may seize and sell thereunder the lands of the execution debtor, including any lands whereof any other person is seized or possessed in trust for the execution debtor.

34.—(1) Any estate, right, title or interest in land which, under section 9 of the Conveyancing and Law of Property Act, may be conveyed or assigned by any person, or over which he has any disposing power which he may, without the assent of any other person, exercise for his own benefit, shall be liable to seizure and sale under execution against such person in like manner and on like conditions as land is by law liable to seizure and sale under execution, and the sheriff selling the same may convey and assign it to the purchaser in the same manner and with the same effect as the person might himself have done.

(2) An inchoate right to dower shall not be liable to seizure or sale under execution.

(3) Property over which a deceased person had a general power of appointment exercisable for his own benefit without the assent of any other person where the same is appointed by his will may be seized and sold under an execution against the personal representative of such deceased person after the property of the deceased has been exhausted.

App. Div. *F. R. Jaspersen*, for the defendant Anderson, respondent. The  
1928. sheriff can sell the interest of the plaintiff held in trust: *Robinson*  
KIMNIAK v. *Moffatt* (1916), 37 O.L.R. 52. As far as the advertisement  
v. is concerned, the sheriff's only duty is to carry out the instructions  
ANDERSON. contained in the writ of *fi. fa.* He is not bound to ascertain the  
interest he is selling. It may be great or small.

January 14, 1929. The judgment of the Court was read by  
HODGINS, J.A.:—The defendant Scharlp has and had an execu-  
tion against the lands of the plaintiff in the hands of the defend-  
ant Anderson, the Sheriff of Essex, who thereunder advertised  
what he understood to be the plaintiff's lands for sale. The  
plaintiff brought this action to restrain the defendants from pro-  
ceeding further with the sale.

The plaintiff's case is that his interest in the land is not  
saleable under a writ of *fieri facias* against lands.

His interest arises under the following documents:—

1. On the 19th June, 1923, Walker & Sons Ltd. agreed to  
sell to John Chowats lot 83, plan 1025, in Ford City, for \$655,  
payable in equal monthly instalments of \$10 each, including in-  
terest at 6 per cent., the balance to be paid within 5 years.  
Chowats by the agreement accepted the vendors' title, agreed  
that time was to be the essence of the contract, and that on de-  
fault of payment of any instalment the vendor might rescind  
the agreement and sell, paying the purchaser the balance over the  
purchase-money, etc.

2. On the 3rd January, 1925, John Chowats and Katrina, his  
wife, parties of the first part, the plaintiff of the second part,  
and Walker & Sons Ltd., the trustees, of the third part, entered  
into an agreement under seal (exhibit 2). This agreement re-  
cites that Chowats and his wife owe the plaintiff, Kimniak, \$300,  
that they have no children to care for their declining years, and  
that Kimniak, "in consideration of the provisions of this agree-  
ment," agrees to support them for their lives, that they have pur-  
chased the lands as above, that a considerable amount of  
purchase-money is owing to Walker & Sons Ltd., and that they  
have executed a joint will leaving all their property to Kimniak  
and appointing him sole executor. It then proceeds:—

"Now this indenture witnesseth that the parties hereto, in con-  
sideration of the mutual covenants herein and of the sum of \$1.00  
now paid by the party of the second part to the parties of the  
first part, agree with each other as follows:—

"1. The parties of the first part hereby assign and set over to the party of the second part all their interest in No. 1350 Hickory-street, Ford City, being lot 83 according to registered plan No. 1025, upon trust that the party of the second part shall support the parties of the first part for the remainder of their lives and on their death pay all their debts and funeral expenses when the trust shall cease and the party of the second part shall be entitled to all the interest of the parties of the first part in the property free from any trusts whatsoever.

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"2. The party of the second part agrees to pay to the parties of the third part the balance still owing by the parties of the first part under their agreement of purchase of the said property and to pay all future taxes.

"3. The party of the second part agrees to lodge, clothe, and supply proper food for the parties of the first part for the remainder of their lives and on their deaths to pay all their debts and funeral expenses.

"4. The parties of the first part agree to deposit their agreement of purchase with the party of the third part and the party of the third part agrees to give to the party of the second part a statement of the amount still owing on the said property and the terms of payment."

There are further provisions which deal with the giving of a deed when necessary, etc., relating to Walker & Sons Ltd., but they do not sign the document.

Exhibit 3 seems to have no direct bearing on the question raised.

Chowats' equitable interest as a purchaser, if transferred to the plaintiff by this agreement, gives the latter no estate in the lands save to the extent to which a court of equity would give Chowats specific performance of the agreement with Walker & Sons Ltd., and that interest would be taken by Kimniak as a trust estate as specified in the document.

If Chowats has no saleable estate or interest, then the plaintiff has none; but, if Chowats' interest can be sold under a writ of *feri facias*, so can that of the plaintiff, unless the existing trust imposed on it prevents this.

The learned trial Judge, in another case, that of *Re Reek and Koven*, 33 O.W.N. 9, has expressed himself as in doubt as to the saleability of the interest of a purchaser of land where his right still rests in contract, and refers to the conflict of views on the subject. In *Robinson v. Moffatt*, 37 O.L.R. 52, the Second Divisional Court held that a vendor having the legal estate in the



App. Div. lands under a contract for sale, occupied the position described  
 1929. by Meredith, C.J.C.P. (at p. 55):—

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“The vendor is a trustee for the purchaser, but bound to convey to him only on fulfilment by the purchaser of all things agreed to be done, on his part, before getting the conveyance. An agreement may never be carried into effect, it may end in nothing in various ways, and it may be that Equity, however measured, may refuse specific performance, and so the vendor may remain owner, unaffected by the agreement, without the aid of any Court. But, whether he does or not, he is still owner and can convey his ownership, subject of course to any equitable right which the purchaser may have; he has none at law except a personal action against the vendor if he should refuse or be unable to carry out his contract.”

This leaves the equitable right of the purchaser undefined, but correctly states the relative positions of vendor and purchaser under a contract for the sale of land and follows the late cases in England on the subject.

In *Holroyd v. Marshall* (1862), 10 H.L.C. 191, the House had laid it down that:—

“In Equity it is not necessary for the alienation of existing property that there should be a formal deed of conveyance. A contract to transfer the property, given for valuable consideration, provided it is capable of being the subject of a decree for specific performance, passes it at once, and the vendor becomes a trustee for the vendee.”

In *Rose v. Watson* (1864), 10 H.L.C. 672, Lord Westbury, L.C., said (pp. 678, 679):—

“When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in Equity, transferred by that contract. Where the contract undoubtedly is an executory contract, in this sense, namely, that the ownership of the estate is transferred, subject to the payment of the purchase-money, every portion of the purchase-money paid in pursuance of that contract is a part performance and execution of the contract, and, to the extent of the purchase-money so paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate . . . . . In conformity, therefore, with every principle, the purchaser paying the money acquired an interest in the estate by force of the contract and of that part performance of the contract, namely, the payment of that portion of the purchase-money.”



These propositions have been considerably modified since 1864. App. Div.  
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In *Ridout v. Fowler*, [1904] 1 Ch. 658, Farwell, J., an eminent authority on Equity, deals at some length with the decisions on the subject, both before and since the foregoing cases were decided by the House of Lords. He says, at p. 661:—  
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“Now the rights of vendor and purchaser have been explained so often that it is sufficient to refer to what Lord Hatherley says in *Shaw v. Foster* (1872), L.R. 5 H.L. 321, 356, where, quoting from his own decision, he says: ‘It is quite true that authorities may be cited as establishing the proposition that the relation of trustee and *cestui que trust* does, in a certain sense, exist between vendor and purchaser: that is to say, when a man agrees to sell his estate he is trustee of the legal estate for the person who had purchased it, *as soon as the contract is completed*, but not before.’ That was in reference to the actual conveyance. The expression used by Sir Thomas Plumer in *Wall v. Bright* (1820), 1 Jac. & W. 494, 503, 21 R.R. 219, 225, which has I think been just read by the noble and learned Lord who preceded me, is this: ‘The vendor, therefore, is not a mere trustee; he is in progress towards it, and *finally becomes such when the money is paid*, and when he is bound to convey.’ James, L.J., puts it perhaps more clearly in *Rayner v. Preston* (1881), 18 Ch.D. 1, 13. He says: ‘I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is *in fieri* the relation of trustee and *cestui que trust*. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*. But when the contract is performed by actual conveyance, or performed in everything but the more formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. And that, in my opinion, is the correct definition of a trust estate. Now here it is quite clear that the relationship of trustee and *cestui que trust* never was created by the completion of the contract, and therefore there never was any estate in land in the events that have happened on which this order by way of equitable execution could have operated. That disposes of the question of any charge upon the real estate, because by reason of the events

App. Div. that have happened, and which the plaintiff in the present action  
 1929. could not interfere with or prevent, no actual estate in the land  
 ever belonged to the debtor at all."

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This decision was affirmed in [1904] 2 Ch. 93.

In 1915, in *Howard v. Millar*, [1915] A.C. 318, 326, 327, the Judicial Committee stated very clearly the position of a purchaser under a contract for the sale of land, the judgment being written by Lord Parker of Waddington, an admitted master of Equity law:—

"The interest conferred by the agreement in question was an interest commensurate with the relief which Equity would give by way of specific performance, and if the plaintiff Miller had in his application attempted to define the nature of his interest, he could only so define it. Further, if the registrar had, as in their Lordships' opinion he ought to have done, specified on the register the nature of the interest which he registered as a charge, he could only have so specified it. Had he attempted further to define the interest, had he, for example, stated it as an equitable fee subject to the payment of the purchase-money, he would have been usurping the function of the Court, and affecting to decide how far the contract ought to be specifically performed.

. . . . . At most, therefore, the plaintiff Miller became the registered owner of an interest commensurate with the interest which, under all the circumstances, Equity would decree by way of specific performance of the agreement."

In *Central Trust and Safe Deposit Co. v. Snider*, [1916] 1 A.C. 266, Lord Parker again deals with the same question in this way (p. 272):—

"It is often said that after a contract for the sale of land the vendor is a trustee for the purchaser, and it may be similarly said that a person who covenants for value to settle land is a trustee for the objects in whose favour the settlement is to be made. But it must not be forgotten that in each case it is tacitly assumed that the contract would in a Court of Equity be enforced specifically.

"If for some reason Equity would not enforce specific performance, or if the right to specific performance has been lost by the subsequent conduct of the party in whose favour specific performance might originally have been granted, the vendor or covenantor either never was, or has ceased to be, a trustee in any sense at all. Their Lordships had to consider this point in the case of *Howard v. Miller*, [1915] A.C. 318, in connection with the law as to the registration of titles in the Province of British

Columbia, and came to the conclusion that, though the purchaser of real estate might before conveyance have an equitable interest capable of registration, such interest was in every case commensurate only with what would be decreed to him by a Court of Equity in specifically performing the contract, and could only be defined by reference to the relief which the Court would give by way of specific performance."

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He then discusses the right to specific performance in that case, and comes to the conclusion that it can only be granted on condition that the person seeking it must abandon any claim to a legacy given to her in the will of the testator who had covenanted to settle the estate in question. In Equity, it was said, she could not have both.

It is necessary to observe that the Act which was being discussed in both of these cases was one permitting the registration of any instrument "purporting to transfer, charge, deal with, or affect any land or interest, either at law or in equity, in such land." The Court held that the document on which the registration proceeded was one "purporting to affect land," and therefore might be registered, but that the section of the Act which permitted this imposed a penalty on non-registration of an instrument by rendering the instrument inadmissible in evidence in certain cases, but had "no further operation." This explains why such an interest as Miller had could be registered, namely, because it "purported" to affect land, but the Act did not give it any further effect than was the legal consequence of the instrument itself. It was upon this basis that, while registrable, its effect was such as Lord Parker described. And the judgment proceeds to admit, as against the registered instrument, an unregistered deed as a material circumstance which the Court must take into account in deciding the extent to which specific performance ought to be granted.

These modern views of the interest taken by a purchaser under a contract for the sale of land have, I think, completely destroyed the notion that what is acquired can be an equitable estate or interest which vests in a stranger to the contract on a sale under an execution against the purchaser. The difficulties and complications which would arise in working out the rights and interests of vendor, purchaser, and his successor, a stranger to the contract, imposed on the vendor by a sale *in invitum*, are such as to make the original conception of trustee and *cestui que trust* untenable.



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In view of the fact that the interest of a purchaser under a contract for the purchase of real estate is expressly subject to what a Court of Equity thinks and decrees that it ought to be, the nature and extent of which cannot be predicated, and that it is also always liable before the Court is seised of it to be lost or to vanish in cases of default, I am of opinion that the interest of such a purchaser is not properly saleable under a writ of *fiery facias*, but can only be reached, if it can be reached at all, by way of equitable execution where the Court can protect all parties and exercise or anticipate the rights which would flow from a contract if recognised in Equity as not merely one capable of specific performance but in fact entitled to be so enforced.

The estate which Chowats, if his interest is assignable, handed on to the plaintiff is an interest subject to the uncertainties I have mentioned, and, if assigned or sold under a *fiery facias*, it would be in a sense merely the assignment or sale of a law-suit or of a right to go to a Court of Equity and there accept whatever it might decree as just and equitable under the circumstances submitted to it when a decision was asked for. This is not the nature or quality of an estate, in my judgment, to which sec. 34 of the Execution Act, R.S.O. 1927, ch. 112, applies.

The plaintiff, standing as he must in the shoes of Chowats, has no saleable interest vested in him by virtue of exhibit 2, and so the plaintiff is entitled to restrain the intended offering for sale, and the sale itself.

But, apart from that, and if the Chowats interest was such as could be assigned or sold under a *fi. fa.*, there is another ground on which the plaintiff would be entitled to succeed.

Section 8 of the Execution Act, R.S.O. 1927, ch. 112, has no application, as the plaintiff is the trustee; no lands are "held in trust for the execution debtor."

The plaintiff is a trustee for both Chowats and his wife. He, by exhibit 2, has acquired the interest of Chowats in the land to hold in trust to perform certain duties and obligations. This imports a charge on the land until those obligations are discharged, as it is then and then only that his beneficial interest in the land will arise. The Chowats, husband and wife, are entitled to have it held by their obligor on a trust till it is completely performed, while a sale to a third party would deprive them of their security, the transfer of which formed the consideration for the trust and its obligations.

I can find no authority for the proposition that a trust estate can be sold under an execution against a trustee for his own debt,



on the ground that, if he fully performs the trust, he will at some future time acquire a beneficial interest in the estate. His interest at present is that of a trustee only, and as such it cannot be sold under the Execution Act to pay his liabilities. See *Blackburn v. Gummerson*, 8 Gr. 331; *McLean v. Fisher*, 14 U.C.R. 617; *Digby v. Irvine* (1844), 6 Ir. Eq. R. 149, which, though not in point on the precise question now dealt with, may be usefully looked at.

The plaintiff should have judgment setting aside the judgment below and restraining the sale, with costs against the defendant Scharlp, who should also pay the costs of the sheriff. See *Hutchings v. Ruttan* (1857), 6 U.C.C.P. 452.

*Appeal allowed.*

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[APPELLATE DIVISION.]

PORTER & SONS V. MUIR BROTHERS DRY DOCK CO. LTD.

1929.  
Jan. 14.

*Negligence—Vessel Delivered to Defendants for Repair—Contract—Bailment—Use of Dry-dock—Removal to Reach of Water—Control—Sources of Supply of Water—Sinking of Vessel—Duty of Bailees to Foresee Lessening of Supply—Breach—Evidence—Terms of Contract—Exemption from Liability while Vessel in Dry-dock only—Damages—Duty to Minimise—Profits of Owners from Contract with Underwriters for Raising of Vessel.*

The plaintiffs' steel scow was received by the defendants and placed in their dry-dock for repair, under a contract, and for reward. The under-water repairs were completed and the scow was made water-tight up to a point stated by the defendants' witnesses to be 22 inches above water-level, but by other witnesses to be somewhat less; and, in December, 1926, it was removed by the defendants from the dry-dock and moored, with a sloping bank under it, in the reach of an old canal, adjoining the defendants' premises, where the defendants intended to make the above-water repairs. The level of the water in the reach fell, at each week-end, 10 or 12 inches or more, two of the sources of supply being closed down for the Sunday holiday. In 1926, Christmas-day fell on Saturday, and, the lessening of the supply of water continuing for two days instead of one, the level dropped from 24 to 32 inches. In consequence of the cutting down of the gates of a lock the level of the water could not be controlled. The defendants had no watchman looking after the scow thus moored out, and it sank with the lowering of the water until one side rested

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on the bottom, whereupon it filled and was submerged. In this action the plaintiffs alleged that the sinking was due to the defendants' negligence, and the trial Judge so found and assessed the damages at a sum which covered the cost of raising and repairing the scow. The negligence of the defendants so found was in mooring the scow where they did, they having full knowledge of the facts, from which they ought to have known that such mooring would probably be attended with danger from the subsidence of the water-level during the prolonged holiday season and at that particular season of the year:—

*Held*, upon appeal, that there was no evidence to support the contention of the defendants that the scow, when brought out of the dry-dock, was delivered into the possession or custody of the plaintiffs, or that anything was done, or any notice given to the plaintiffs by or on behalf of the defendant, which could by any reasonable construction be interpreted as delivery, constructive or otherwise.

2. The defendants displayed a want of reasonable care in mooring the scow where they did, under the then existing conditions, and in failing to take any precautions for its protection.

Not seeing or knowing that which ought to have been seen or known may constitute a foundation for a charge of negligence: *Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93.

The onus was upon the defendants, as bailees for reward, to establish that they exercised that reasonable care which a prudent man would exercise for the protection of his own property; and they had failed to satisfy that onus.

3. By the special terms of the contract, the use of the defendants' dry-dock was to be subject to the rules and regulations, one of which was that they were not to be held responsible for injuries to the vessel; and they contended that, even if they, or their servants, were negligent, they were relieved from liability by this provision:—

*Held*, that the rule must be strictly construed, and, if vague or ambiguous, construed against the defendants; and, the scow not being in the dry-dock or even upon the defendants' premises when injured, they were not exempt from the consequences of their negligence.

*Seem*, if the scow had been in the dry-dock when injured, as the defendants were not common carriers, and were liable only for negligence, the language of the exemption clause would have been interpreted as covering negligence by the defendants or their servants, because there was no other liability to which it could be applicable.

Review of the authorities.

4. The insurance underwriters who were liable to the plaintiffs for the loss, and on whose behalf this action was brought, asked for tenders for the raising of the scow. The plaintiffs tendered, and their tender was accepted. Under a new contract with the underwriters, the plaintiffs raised the scow, and by their work made a profit of about \$900:—

*Held*, that the duty of the plaintiffs to minimise their loss required them only to do what should be done by a reasonably prudent man in the ordinary course of business; and the subsequent transaction, not being one so arising, had no bearing upon the plaintiffs' duty as regards the defendants and was not to be taken into account in estimating the plaintiffs' damages.

*Per* HODGINS, J.A.:—The evidence did not support the conclusion that the defendants ought to have known or foreseen the possible action of all the sources of supply of water to the reach in which the scow

was placed. As bailees the defendants were entitled to move it from their dry-dock, and to moor it afloat, but they were bound to anticipate some lowering of the water; and to have left it to float with a sloping bank under it, so that, in case of a drop in the level under ordinary week-end conditions, one side would ground before the other, was to place it in an unsafe position.

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AN appeal by the defendants from the judgment of ROSE, J., after trial of the action without a jury, in favour of the plaintiffs for the recovery from the defendants of \$4,407 damages suffered by reason of the sinking of the plaintiffs' scow by the negligence of the defendants, as found by the trial Judge.

September 28 and October 8 and 9, 1928. The appeal was heard by MULLOCK, C.J.O., MAGEE, HODGINS, and GRANT, JJ.A.

A. Courtney Kingstone, K.C., for the appellants, denied any negligence on their part, submitting that as bailees of the scow they had used reasonable care for its preservation. Reference to *Coggs v. Bernard* (1703), 2 Ld. Raym. 909; *Pratt v. Waddington* (1911), 23 O.L.R. 178; *Karn v. Ontario Garage and Motor Sales Ltd.* (1919), 16 O.W.N. 31; *Grant v. Armour* (1894), 25 O.R. 7; *Claridge v. South Staffordshire Tramway Co.*, [1892] 1 Q.B. 422; *Rutter v. Palmer*, [1922] 2 K.B. 87, at p. 90. He then argued that, even if negligent, the appellants, by reason of the dock order and the rules and regulations on which they undertook repairs on the scow, had contracted themselves out of any liability for negligence causing damage owing to the lowering of the water-level in the canal. Reference to *Pyman Steamship Co. v. Hull and Barnsley Railway Co.*, [1915] 2 K.B. 729; *Reynolds v. Boston Deep Sea Fishing and Ice Co.* (1922), 38 Times L.R. 429; *Forbes Abbott and Lennard Ltd. v. Great Western Railway Co.* (1927), 44 Times L.R. 97.

R. I. Towers, K.C., and O. S. Hollinrake, for the plaintiffs, respondents, contended that the appellants were guilty of negligence as bailees: *Brabant & Co. v. King*, [1895] A.C. 632, 641; *Scott v. London and St. Katherine Docks Co.* (1865), 3 H. & C. 596; *Welden v. Smith*, [1924] A.C. 484. The terms of the documents relied upon by the appellants to exempt them from liability for negligence were not sufficiently clear and unambiguous to achieve that purpose. Reference to *Price & Co. v. Union Lighterage Co.*, [1904] 1 K.B. 412; *Joseph Travers & Sons Ltd. v. Cooper*, [1915] 1 K.B. 73; *Pyman Steamship Co. v. Hull and Barnsley Railway Co.*, [1915] 2 K.B. 729, at p. 733. The



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negligence did not occur while the vessel was in dry-dock, and was placed by the defendants in an improper and dangerous position, of which they knew or should have known: *Great Lakes Steamship Co. v. Maple Leaf Milling Co. Ltd.* (1923), 54 O.L.R. 174; *Brabant & Co. v. King*, *supra*.

[The other arguments of counsel are sufficiently referred to in the reasons for judgment, *infra*.]

January 14, 1929. GRANT, J.A.:—This is an appeal from the judgment of Rose, J., delivered on the 16th May, 1928, after the trial of the action without a jury, whereby the defendants were held liable for the sum of \$4,407 damages suffered by the plaintiffs by reason of the sinking of a large steel scow, which sinking was alleged by the plaintiffs and found by the learned trial Judge to have been due to negligence on the part of the defendants. The defendants are owners and operators of a dry-dock in the vicinity of the Welland canal, the waters being of the same level with those in the canal. The plaintiffs' scow No. 10, having been damaged, was delivered to and received in the defendants' dry-dock for inspection and repair. The under-water repairs were completed and the scow was made water-tight up to a point stated by the defendants' witnesses to be 22 inches above water-level, but by other witnesses to be somewhat less. Desiring to use their dry-dock for some other vessel or vessels, the defendants removed scow No. 10 from the dry-dock, and placed it out in the reach of water adjoining their own premises, for convenience of access for the purpose of completing the repairs which still remained to be made above-water. The defendants placed the scow alongside a tow-path on the margin of the old canal and fastened it with cables to mooring posts on the tow-path, the scow being approximately 14 feet from the bank. This bank under water had a very gradual slope, the depth of water under the nearer side of the scow being such as to allow a clearance of only about 15 inches, the scow drawing approximately 3 feet 2 inches on the inner side and about 2 inches more on the outer side. The scow was so moored in the reach of the old canal about ten days or two weeks before the Christmas holiday in the year 1926. Christmas-day fell on Saturday. According to the evidence, upon which there was not much dispute, the level of the water in the canal and in this reach fell, at each week-end, 10 or 12 inches, some witnesses placing the fall as low as 18 inches. This fall was due to the fact that, of the sources of supply of water two or



more were closed down each week-end for the Sunday holiday, and, the water supply being lessened, the flow down stream continuing, the level of the water in the canal and in the reach was necessarily lowered as above stated. On the occasion in question, by reason of the fact that Christmas-day fell on Saturday, there were the two holidays falling together, namely Saturday and Sunday. The lessening of the supply of water already referred to continued therefore for at least two days instead of one day as was usual, and, by reason also of another factor later to be referred to, the level of the water being neither controlled nor controllable, such level dropped about 24 inches according to the plaintiffs, or about 32 inches according to the defendants. Several of the defendants' witnesses stated that the water dropped 32 inches, the defendant Muir putting it as high as 36 inches or 3 feet.

The defendants did not have any watchman looking after the scow thus moored out, which necessarily sank with the lowering of the water. The side of the scow next to the bank or tow-path rested on the bottom; the outer side, being in deeper water, continued to sink until the water reached above the line to which the repairs had been made, whereupon the scow filled and sank. As the scow was made of steel, having a length of 150 feet by a width of 40 feet and a depth of 11 feet, it will readily be realised that the raising of the scow would be a somewhat serious matter. It cost \$4,000 to get her up, and \$400 or \$500 more to have her repaired, the judgment for the plaintiffs being for the sum of \$4,407.53, with costs of the action.

The plaintiffs allege that the sinking of the scow was due to the defendants' negligence, for which the latter were liable to the extent of the damage suffered. In their pleading the plaintiffs set out a statement of the material facts as above outlined, and went on to allege that the mooring of the scow by the defendants to the east bank of the old tow-path, in the reach of the canal above lock No. 1, was for the convenience of the defendants to enable them to complete the above-water repairs, which they had contracted to make thereon. The plaintiffs allege further that the scow was so moored by the defendants in an improper and dangerous position, having regard to the draft of the scow and the depth of the water, and having regard also to the fact that, particularly after the closing of navigation in the canal, the waters of the canal and its approaches are subject to rapid fluctuations in level, of all of which the defendants were well aware

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and from which it should have been apparent to them that the scow was placed in a dangerous position. They allege further that the defendants knew, or should have known, that the lowering of the water would be likely to have consequences such as followed in the present case, namely, the grounding of the inside of the scow, the continued sinking of the outer side, and ultimately the filling and sinking of the scow herself. They state further that, as they required the scow for use in their business, they raised her and had her repaired by the defendants at a further cost of \$400, such repairs being rendered necessary by the sinking, and that they paid the defendants the amount of the repair-bill under protest.

The defendants pleaded that the scow was placed in their dry-dock under a certain dock order which was given to them by the plaintiffs, and which was expressly stated to be subject to the defendants' rules and regulations and conditions prevailing, and that by such rules and regulations the defendants were expressly relieved from liability for any injuries which the vessel might sustain. They pleaded further that when the under-water repairs were completed on scow No. 10 on the 11th December, 1926, the plaintiffs were advised that the repairs had been made and that the scow would have to be removed from the dry dock to make room for other vessels; that, as a result of such communication with the plaintiffs and with the knowledge of the plaintiffs' representative, the scow was floated off the dock and was towed to the point where she was moored alongside of another scow (No. 7) belonging to the plaintiffs and which the defendants allege had been moored at that point. They further plead that the plaintiffs' representative inspected the moorings of scow No. 10 and approved of the same and agreed with the defendants that the above-water repairs which remained to be done could be done at a later date, as the scow was to remain there for the winter. The defendants further allege that the plaintiffs, after the scow had been removed from the dry-dock, "were in full possession and control of the scow and were well aware of the fact that, after the closing of navigation in the Welland canal, the waters in the said canal were subject to sudden fluctuations in level, and therefore no responsibility or liability rested on the defendant company for any damage sustained to the said scow by reason of the

sudden letting out of the waters of the canal." (See para. 8 of the statement of defence.)

The defendants deny negligence on their part and seek to put upon the plaintiffs the responsibility for there not having been a watchman to protect the scow. They pleaded also that, by virtue of the special contract and regulations, there was no liability on the defendants for any loss or damage sustained, and allege that the vessel was not in the dry-dock of the defendants or in their possession when it met with the mishap. They further plead that in any event the scow was moved from the dry-dock and placed at the moorings referred to, by the defendants, as agents for the plaintiffs, and that the plaintiffs inspected the moorings and approved of the same, and that thereupon all liability or responsibility for the care and custody of the scow ceased in so far as the defendants were concerned.

One other very important fact remains to be mentioned. In the spring of 1926 the regulating weir, by which the level of the waters in the reach of the old canal, in which the scow was moored, was controlled, having become undermined, had to be repaired. To enable such repairs to be made, by means of a coffer-dam, the weir was closed, and, with a view to taking care of the surplus water which theretofore would be allowed to flow away through such regulating weir, the top of the gates of the old lock No. 1 was taken off to a depth of 4 feet. In consequence of the cutting down of these gates of old lock No. 1, the level of the waters could not be controlled, and, if the supply or any considerable portion of it were cut off for a sufficient length of time, of necessity the level of the waters in the reach of the old canal, where the scow was moored, would fall to the extent of the 4 feet thus removed from the gates of the old lock.

The learned trial Judge found that the sinking of the scow, and the loss sustained by the plaintiffs in consequence thereof, were due to the defendants' negligence in mooring the scow where they did, having, as he found, full knowledge of the facts, from which they ought to have known that such mooring would probably be attended with danger from the subsidence of the water-level over the prolonged holiday season and at that particular period of the year.

On the presentation of the appeal, counsel for the defendants relied upon four principal grounds, namely: first, that as a fact,

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1929. the defendants; second, that in law, by virtue of the defendants' rules and regulations, they were relieved from any liability by the terms of their contract; third, that, at the time when the mishap occurred, the scow had been constructively delivered to and was in the possession and in the control of the plaintiffs; fourth, that in any event the plaintiffs were not entitled to a sum of \$900  
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Grant, J.A. (approximately) which was in the nature of a profit made by them on the contract which they had made with the underwriters for the raising of the scow after she had been sunk.

The third contention, namely, that the scow had been delivered to the plaintiffs and was, at least constructively, in the plaintiffs' possession and control, is not supported by the evidence.

As the defendants appeared to consider it relevant to the issue involved, it is convenient at this point to refer to the original general arrangement, as it was called, between these parties, stated to have been made in or about the year 1924, as intended to relate to and govern, in a limited degree, the transactions between the parties. One of the defendants, Muir, gives his version of the general arrangement. In answer to a question in reference thereto he said that it was this, "that we should supply men to take the scows out of the dock and moor them, instead of Porter doing it, which was the correct thing for them to do." He proceeds to state that the reason for this arrangement being made was, that Porter & Sons (the plaintiffs) did not have any organisation at Port Dalhousie to do the work, their fleet being kept at Port Weller.

Ansell, the defendants' superintendent, states his recollection of the arrangement made in November, 1924, in the following words:—

"Mr. Porter stated it was inconvenient sometimes to bring his organisation up from Port Weller, as they were busy most of the time, and requested that we put the scows on or off (the dry dock presumably) or put them out, or let them in. That was done. They would take them away at their convenience."

It is at once apparent that, unless the defendants had completed the work which they were to do on scow No. 10, the mere act of taking it out of the dry-dock and mooring it outside could not possibly be a delivery of the possession and custody to the



plaintiffs, unless there was something more, in the nature of a delivery to the plaintiffs after notice that the defendants had finished their work. There was no evidence in any way approaching such a point in the case at bar. What was done is shewn by the evidence both of Muir and of the defendants' employees Ansell and Little. The evidence of Muir is of a somewhat indefinite character.

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The evidence of Ansell as to the repairs to be made is that there were repairs both under water and above water to be made. He states further that the under-water repairs were complete and up to a point 22 inches above the water-line; and that he notified Luther Kuchenbecher, a superintendent of the plaintiffs, "that the repairs were practically completed." In answer to the question of the learned trial Judge, "What did you tell him?" he replied:—

"That the under-water repairs were completed, and he was up at the dock a couple of times a day; he looked them over and apparently appeared to be satisfied. I told him it was our intention to put her off that night, and that the work would be finished outside. He made no objection, and that was done."

Then on the question of the place where the scow was to be moored, Ansell was asked:—

"What about the mooring place where this was put? A. I believe I made no suggestion as to just where she would be put. At that time boats were coming and going in the pond every hour; they were arriving there to lay up for the winter. If I had time to do it, I made a note, but I may have neglected to speak to Luther about it.

"Q. You did not tell him where you were putting her? A. I do not think so.

"Q. You took her out where she was placed? A. Yes."

The scow in question, No. 10, was moored by the tow-path of the old canal, near to the end of scow No. 7, which was also the property of the plaintiffs, and had been placed there awaiting repairs in the defendants' dry-dock. This scow No. 7 was there moored in deeper and apparently safer water in front of the grand stand of the Henley Regatta course. An attempt was made on the part of the defendants to justify the mooring of scow No. 10 along the tow-path, upon the ground that the plaintiffs' other

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scow, No. 7, was moored alongside. This also was, apparently, relied upon as supporting the defendants' contention that they had delivered scow No. 10 into the custody of the plaintiffs, because they had tied it up alongside of another scow which was the plaintiffs' property. What was done in that regard falls far short of what was urged on the part of the defendants, even if scow No. 10 had been moored where it was for the express purpose of putting it with the plaintiffs' scow No. 7. But that was quite evidently not the primary or chief reason for mooring scow No. 10 in that position. The reason or reasons were stated by Ansell, the defendants' superintendent, on his examination for discovery, from which quotations were used on his cross-examination at the trial:—

"Q. 57. Why did you decide to put her in that position exactly? A. Because of the access to the dry-dock facilities . . . . . and the fact that all other berths were taken or spoken for . . . . . and that we had used that berth on numerous occasions for such work."

At the trial both Muir and Ansell suggested the further reason that they wanted to put scow No. 10 with scow No. 7, the plaintiffs' property. I think it is manifest that this additional reason was an afterthought. It may indeed be that the defendants considered it proper to keep the plaintiffs' two scows together, but I do not think for a moment that, when they moored scow No. 10 where they did, they had any thought of returning her to the possession or custody of the plaintiffs. The defendants had not completed the work which they had contracted to do upon her, and were evidently placing her at a point adjacent to and conveniently to be reached from the dry-dock itself, in order to facilitate the completion of the repairs.

Kuchenbecher, the plaintiffs' superintendent of floating equipment, tells the story regarding scow No. 7 at the foot of p. 163 and top of p. 164 of the transcript of evidence taken at the trial. On line 27, p. 163, the figure 10 should be 7, as it was scow No. 7 which was being referred to. It will be noted, on a perusal of the evidence of this witness, that scow No. 7 was delivered by one of the plaintiffs' tugs at the entrance of the defendants' dry-dock for the purpose of being placed in the dry-dock for repairs. It was not admitted to the dry-dock itself at the time of such delivery, because there were other vessels ahead of it, but this wit-

ness makes it perfectly clear that neither he nor his employers, the plaintiffs, had anything to do with the placing of scow No. 7 in front of the grand stand. He states: "I had nothing to do with the moving of scow No. 7 from the entrance to the dry-dock to in front of the grand stand;" and further he states that he learned that it had been so placed a day or two after it had been shifted. At another point in his evidence he stated quite frankly that he had taken the mud out of the bottom of scow No. 7 after she had been placed in front of the grand stand, but there is not a tittle of evidence to shew that he had anything whatever to do with scow No. 10 or interfered with it in any way whatever. I think there is no evidence whatever to support the contention on the part of the defendants that scow No. 10, when she was brought out of the dry-dock, was delivered into the possession or custody of the plaintiffs, or that anything was done or any notice given to the plaintiffs by or on behalf of the defendants which could by any reasonable construction be interpreted as delivery, constructive or otherwise.

The other chief grounds of appeal, as urged by the defendants' counsel, may be taken up in their order, the first being the contention that there was, in fact, no negligence on the part of the defendants.

A summary of the pleadings has already been given. The plaintiffs plead explicitly (*inter alia*) that the defendants took the scow out of the dry-dock, and moored her "in an improper and dangerous position, having regard to the draft of the scow, and the depth of water at the place where she was so moored, and having regard also to the fact that at certain seasons of the year, and particularly at and after the closing of navigation in the Welland canal, the waters of the canal and its approaches and the neighbouring waters affected by the operation of the canal or of the power plants and other operations in the vicinity, are subject to rapid fluctuations in level, and apt to rise or fall suddenly, a fact which was known, or should have been known, to the defendants, and made, or should have made, apparent to them the danger of the position in which the said scow was placed on or about the 11th day of December, A.D. 1926, aforesaid."

Unless by virtue of the general denial of allegations in the statement of claim, the defendants do not allege that the place or position in which the scow was moored was a safe and proper place for that purpose, as they would be required to plead by Rule 142 of the Consolidated Rules of Practice, if they were relying upon that as a fact in their defence.

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On the contrary, as already noted (*supra*), in para. 8 they seek to throw the responsibility for the choice of the mooring place upon the plaintiffs, who, they alleged, "were in full possession and control of the said scow and were well aware of the fact that, after the closing of navigation in the Welland canal, the waters in the said canal were subject to sudden fluctuations in level, and therefore no responsibility or liability rested on the said defendant company for any damage sustained to the said scow by reason of the sudden letting out of the waters of the canal." Throughout the other paragraphs of the defence there is manifest a placing of the responsibility upon the plaintiffs, coupled with the further plea that the defendants were excused by the special conditions of their contract. At the trial, a very large part of the evidence for the defendants was directed to shewing that the mooring place was a perfectly safe and proper one, a fact not pleaded, and to shew further that the lowering of the water-level was unusual and abnormal, and could not have been anticipated, a line of defence directly in contradiction to the spirit of para. 8 of the statement of defence. No amendment of the defence was requested or made. Assuming, however, that the defendants were entitled to put in this evidence, there emerge to be determined two questions, namely: "Was the lowering of the water so unusual and abnormal, having regard to all the conditions and circumstances known to the defendants, that they could not reasonably be expected to anticipate its happening?" And: "Ought the defendants to have anticipated danger threatening the scow, in the event of such lowering of the water?" Dealing with the latter question first, it is quite clear, upon the evidence for the defendants and plaintiffs alike, that any considerable fall in the water-level must be attended with danger to the scow. She was moored to the tow-path, over a gradually sloping bank, in such a position that the inner side would ground on the bank, while the outer side would continue to sink in deeper water; the cables would prevent her from slipping out into deep water, and as soon as she was tilted over far enough to reach that part of her hull which had not been repaired, the water must pour into her. The only differences between the statements of the witnesses for the opposing parties, on this feature of the case, were as to the height of the repairs above water, and as to the extent to which the water-level might fall before the scow would be in danger.

Upon the former question, as to whether or not the defend-



ants should have anticipated the fall, or such a fall as would be dangerous, the evidence was conflicting.

At this point it may be noted that the fact that such a lowering of the water had never happened before is merely evidence tending to shew that it was not reasonably to have been anticipated, and that only if the conditions remained the same, and would not, even then, be conclusive. If, on the other hand, the conditions had been materially changed, to the knowledge of the defendants, such evidence would, in greater or less degree, lose its force, depending upon the extent and probable effect of the change.

In other words, the defendants' course of conduct and actions must be judged in the light of the conditions existing to the knowledge of the defendants, at the time of the mishap, and thus must it be determined whether or not they failed to exercise such care as a reasonably prudent man would have displayed.

The witnesses did not agree as to the extent of the drop in the water-level. The variance, as to some of them, may be accounted for in part by the fact that on the night of Friday the 24th December the water was 7 inches above normal level (see evidence of Currie, the lockmaster), so that, when it was found on Sunday morning to be 18 inches below normal, as stated by some of the witnesses, the total fluctuation would be 25 inches. Two witnesses, Ansell and Brigneau, both employees of the defendants, and called as witnesses in their behalf, said the total drop was 32 inches, and gave as their measure the levels on the dock-gates. Muir himself thought the total fall was 3 feet. No other witness puts it at so high a figure, unless the testimony of Umbach is relied upon. Judging from his lack of any reason for being interested in keeping track of the water-levels, and the manner in which he contradicted himself, I would not consider his testimony to afford a very safe basis for a finding.

For the plaintiffs, although not asked about it in chief, the witness Perry, who had been an employee of the defendants, on cross-examination said that the fluctuation on the occasion in question was the greatest he had ever seen. He states that the ordinary week-end drop had been "around about 12 inches" from normal; and, if the height of 7 inches above normal (*supra*) be added, the total drop would be about 19 inches.

Hoover, for 7 years overseer of the Welland canal (a disinterested witness), states that the extent of the drop on the Sunday morning after Christmas was about 18 inches below normal.

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Currie, lockmaster on the canal, states that the water-level dropped on that occasion  $28\frac{1}{2}$  inches. He explains that the level on Friday night had been 7 inches above normal, and the total drop 28 inches, which would make it about 21 inches below normal.

The normal level, as given by the canal officials, was at the line of the bottom of the coping-stone on the wall of the canal. That coping-stone is 18 inches high; and the next lower course of stone is of the same height. When, therefore, they speak of 18 inches above normal, they mean at the top of the coping-stone, and when they mention 18 inches below normal, they measured by the bottom of the next lower course of stone.

The defendants' employees Ansell and Brigneau, as already mentioned, fix their measurements by the water-level at the defendants' dock-gates, but it is worthy of note that they fix the water-level, before the drop, at 11 ft. 6 in. over the dock-sills, on Christmas morning, because the defendants admitted a vessel, the "Nesbitt," into their dock, and, they say, they must have had 11 ft. 6 in. of water over the sills to put her on the blocks. Ansell says the "Nesbitt" drew only about 8 feet 6 inches or 9 feet, but he says the blocks were higher than the sills. He did not give this explanation until he was cross-examined as to the draft of the "Nesbitt," and he gave the impression that a depth of 11 feet 6 inches was necessary over the sills at the dock-gate. It is therefore apparent that there was a definite conflict of testimony upon the question of the extent of the fall on the occasion of the sinking of the scow. There was as marked a conflict upon the question whether or not the extent of the fall was unprecedented or abnormal, and therefore not to have been anticipated. Currie (lockmaster) states that there was a drop of 2 feet in the water-level every week-end in 1925, the reason being, apparently, the same as in the present case, namely, that the weir was out of repair, and they were not able to control the water over week-ends, and he mentions the fact that upward-bound boats got stuck in the canal. He states that a fall of 2 feet was not unusual. He says that at 8 a.m. on Saturday the 25th December the water was 8 inches below normal level.

The witness Hara, engineer in charge of the Welland canal, gave evidence as to the sources of supply from which the water in the canal and in the reach where the scow was moored was received. His experience extended over 24 years. Water is received from the present canal, through the locks; also from the

discharge by the Cataract Power Company; from the natural drainage down Twelve-mile Creek; and from the old canal itself. He explains that the raising and lowering of the water in this reach depends on the amount of water discharged into it and the operating of the discharging works to handle the water. He states that "the effect of the closing down of the manufacturing plants above would bring about a lowering of the water."

"Q. Why? A. Because the supply of water would be decreased.

"Q. That discharged into the old canal? A. Yes, sir."

He also states that the water would fluctuate from a few inches to perhaps a foot and a half, or perhaps three feet, at odd times, from the extreme high to extreme low. At Christmas-time in 1926, he says, the regulating weir was closed up, undergoing repairs, and 4 feet had been taken off the top of old lock No. 1 upper gates, to take care of the water. This was done in the spring of 1926, and the effect was that from the time when the 4 feet were cut off the old lock-gates there was nothing to control the water-level, or to prevent it falling to the extent of 4 feet (approximately) below normal. On cross-examination, he states that the lowering of the water at the Christmas week-end was not an unusual occurrence, because the water went down every week-end, more or less; that during the summer of 1926 a lowering of perhaps 18 inches would not be unusual; that a lowering of 18 inches below normal, over a double-holiday week-end (such as the one in question), would not be unusual, under the conditions then existing.

Perry, who had been in the defendants' employ in 1926, but was called for the plaintiffs, on cross-examination gave it as his view that the week-end fluctuation, that year, was only about 8-10 inches, which was, if my memory serves me, a smaller fluctuation than was given by any other witness. He states also as his opinion that a fluctuation of 18 to 20 inches would be a very unusual thing.

Hoover (canal overseer) gives the following testimony:—

"Q. Starting at normal, and during the period you have these conditions at the outlet, that is 4 feet being taken off the upper gates of lock No. 1, and the regulating weir closed, to what extent would the water fluctuate from normal during that period, at week-ends? A. Oh, anywheres from 12 to 18 inches.

"Q. For how long a period prior to Christmas, 1926, did that

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1929. we always had control over it, we had the weir.

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"Q. For some months you did not have control? A. Yes.

"Q. During that period—is that the time you refer to? A.  
During that period it was every week.

"Q. The variation below normal would be from 12 inches to  
18 inches. A. Yes, sir."

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He states also that he had seen the water 18 inches above normal, and that on the Sunday (the 26th December) it had dropped to 18 inches below normal. He explains that, under the conditions existing in December, 1926, with 4 feet cut off the lock-gates, and a partial cutting down of the supply of water by reason of the closing of the plants above, over the double holiday week-end, there was nothing to control the water-level or to prevent its dropping to 4 feet below normal level.

On the other hand, the defendants' witnesses (chiefly their own employees) were equally emphatic that the drop on the occasion in question was unusual and abnormal.

That the change had been made in the height of the lock-gates in the spring of 1926, and therefore that the water-level could not be controlled, but would continue to drop to the maximum of 4 feet, if the cutting off of the supply of water from above continued, was well known to the defendants. In Muir's evidence:—

"Q. What could cause the lowering of the water under these conditions? The shutting down of the plants? A. The stopping of the supply at the top, and if there was any neglect about not shutting down the valves in new lock No. 1.

"Q. Not shutting them off? A. If they left them open the water would still keep coming out.

"Q. You do not know whether they did or not? A. No.

"Q. You did know that 4 feet had been taken off the canal-gates? A. To a number of feet.

"Q. You knew of that condition? A. Yes.

"Q. And you knew the big regulating weir was out of commission? A. Yes; that tended to keep the water high.

"Q. You knew those conditions existed? A. Yes.

"Q. You knew that 4 feet, or a number of feet, were taken off the gates, and they did not form a retaining wall, the upper gates of the old lock No. 1 of the old canal, they did not form any retaining wall? A. The upper gates?



"Q. Of lock 1? A. No, the water would keep going down until it got down to that level.

"Q. And you knew that if the water got down to that level it was dangerous to any craft that might be along the bank? A. I never thought it would get to that level. The whole traffic of the Great Lakes goes at that level.

"Q. There was no traffic in December, 1926? A. No, there was no traffic in December, 1926. Ice conditions form about that time.

"Q. Was there ice at that time? A. Yes.

"Q. Would that keep the water back from coming into that level? A. Oh, I don't think so.

"Q. You think the shutting down of the plants— A. I think the shutting down of the plants would have stopped the supply.

"Q. By the closing down of the axe company, the Welland Vale, and Cataract company? A. Yes, like when they shut down on Sundays.

"Q. You knew it was Christmas-time? A. Yes.

"Q. You knew there was Saturday and Sunday, both, and probably Christmas-eve. Friday, Saturday, and Sunday, you knew those plants would be shut down? A. I presume they would be shut down Christmas. I don't know about Friday."

As the above cutting-down of the lock-gates had been done in the spring of 1926, there had been no similar double holiday week-end, with navigation closed, during that period of time. Conditions, therefore, existing at this double holiday, with navigation closed, had not been duplicated, and in that respect the foundation upon which the defendants' witnesses based their opinion that the extent of the fall was abnormal did not exist. Conditions, of which the defendants were well aware, existed at that time which had not previously obtained, and the defendants must have known, if they had given the matter any thought at all, that the extended holiday, with plants closed down and the longer continued lessening of the water supply, coupled with the greater opening at the outlet, must inevitably result in a greater drop in the water-level. Notwithstanding his fencing with counsel, on cross-examination, and also with the trial Judge, it is quite apparent from the evidence of Ansell that he realised the importance of the special conditions, known to the defendants, which existed at Christmas, 1926, and had not existed previously,

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and which the defendants ought to have borne in mind and considered, before mooring this scow where they did. As has already been noted, the defendants, when seeking to place the responsibility upon the plaintiffs, explicitly plead these very special conditions, and say that the plaintiffs were aware of them; and, in the face of their pleading, they cannot very well be heard to say that the conditions did not exist, or that the close of navigation had no effect.

Another feature is worthy of comment. Ansell saw the scow on Saturday afternoon, and knew then that the water had already dropped 10 inches, with Sunday to follow. He knew also that at most the scow, before the 10-inch drop, had only about 15 inches of clearance, on the side next the canal-bank, and therefore not more than 5 inches, after the drop. He had to admit that the clearance may have been an inch or two less than that, and also that he could not state positively that the scow was not, even at that time, resting on bottom. The defendants had no watchman looking after the scow (although, by para. 9 of their statement of defence, they urge the advisability of having one there), and yet, notwithstanding the above, Ansell, the defendants' superintendent, not only did not take any precautions for the protection of their customer's property, then in their hands for repairs, but he never even examined it, or its position, to see if it would be likely to come to harm by reason of the further drop in the water-level likely to occur during the Sunday holiday, as had been the usual effect theretofore of the closing of the plants over Sunday.

It would appear from the evidence that Ansell was the last person who saw the scow before she sank, and that was about 4 p.m. on Saturday the 25th December. When next seen (that was on Sunday morning) she had sunk. At what time, or at what water-level, she sank, no witness was able to state. The witnesses did not agree as to the height above water, to which the scow had been repaired or made water-tight, nor as to the extent of the drop in the water-level to which the scow could go without becoming in danger of filling. Ansell says a drop of 28 inches was necessary before the scow would be in danger, and that she was repaired to 22 inches above the water-line. Little, the defendants' foreman, said that if the outer corner of the scow went down 17 inches she would fill. Perry, who had done the plating, says the scow was repaired up to 6-10 inches above the water-line, and that it would take in water if it sank more than 10 inches. Kuchenbecher, the plaintiffs' employee, said that a

drop of 18 inches in the water-level would cause the scow to fill and sink.

Upon the above conflicting testimony with respect to these material (some of them vital) factors in the case, the learned trial Judge makes an express finding of negligence against the defendants, stressing the features to which I have called attention above, and, in the light of the evidence, coupled with the defendants' pleading, I could not come to any different conclusion.

The defendants received and docked the plaintiffs' scow for repair. When the under-water repairs were completed, for their own convenience and to make possible the admission of other vessels into the dry-dock, they put the scow outside and off their own premises. In order to further their own convenience of access, and to facilitate their making the above-water repairs, they moored her near at hand. They knew the gradually sloping formation of the canal-bank at and over which they moored the scow. They knew that she was water-tight only for a short space above the water-line, and therefore that special care was necessary to make sure that she should be kept on an even keel or bottom. They fastened her securely to the canal-bank, and thus made certain her being held over the sloping bottom, in case of a drop in the water-level. They knew that the shutting down of the manufacturing plants above, over the Sunday of each week-end, i.e., over one day's holiday, reduced the supply of water and steadily brought down the water-level in the reach where they moored the scow, to the extent of 10-12 inches or more. They knew that the regulating weir had been closed, and that 4 feet had been cut off the lock-gates, and there was no control of the water-level possible, so that, the supply being reduced and so continuing, the level must inevitably fall to the extent of the 4 feet, and that there was no means of preventing it. They knew that navigation was closed, and they plead the effect which this had on the fluctuation of the water-level. Their superintendent, Ansell, at 4 p.m. on Saturday, knew that the scow must have been almost touching bottom, if not actually resting upon it, as a consequence of the drop in the water already suffered, and that, owing to the regular Sunday week-end holiday then still to follow, and continued shutting down of the plants and lessened supply, there must be the further falling of the water-level, with resulting danger to the plaintiffs' property, then in their hands. The defendants knew all these things, and knew, or ought to have known (if they considered the matter at all, as a reasonably prudent man would have done with his own property), that they were subject-

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ing the plaintiffs' scow to needless risk and danger, and they did nothing. In my opinion, the defendants displayed a want of reasonable care in two respects, positive and negative: positive, in mooring the scow where they did, under the then existing conditions; and negative, in their failure to take any precautions for its protection, and particularly when Ansell saw the extent of the fall on the Saturday afternoon, with the Sunday week-end drop still to be sustained. My impression is that the defendants never stopped to consider the matter at all. Not seeing or knowing that which ought to have been seen or known may constitute as sure a foundation for a charge of negligence as ignoring that which is seen or known, or failing to adapt one's conduct or actions to the same. *Vide Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93, followed in a long line of cases, both in England and in Ontario.

When considering the question whether the defendants did or did not exercise reasonable care, it is of importance to bear in mind that the onus rests upon the defendants, as bailees for reward, to establish that they did exercise the reasonable care which a prudent man would exercise for the protection of his own property, under the circumstances of the case.

The general rule applicable to the position of bailees is that they are bound to restore the subject of the bailment in the condition in which they received it, with such repairs or improvements made therein as they may have contracted for, and it is for the bailees to furnish a satisfactory explanation for not having done so. They must shew that reasonable care has been exercised. *Vide Erle, C.J.*, in delivering the judgment of the Court in *Scott v. London and St. Katherine Docks Co.*, 3 H. & C. 596, approved by the House of Lords in *Dollar v. Greenfield* (1905), *The Times*, May 19th. See also the language of Buckley, L.J., in *Joseph Travers & Sons Ltd. v. Cooper*, [1915] 1 K.B. 73, at p. 88; also Lord Halsbury in *Morison v. Walton* (unreported), quoted by Buckley, L.J., in the above case; also Atkin, L.J., in *The Ruapehu* (1925), 21 Ll. L. Rep. 310, at p. 315.

As bearing upon the duty resting upon the defendants, especially when Ansell saw the extent of the drop on Saturday, an old case of *Leck v. Maestaer* (1807), 1 Camp. 138 (a decision of Lord Ellenborough), makes interesting reading, especially in view of the similarity of the facts. See also the judgment of the Judicial Committee in *Brabant & Co. v. King*, [1895] A.C. 632, at p. 640, where Lord Watson, delivering the judgment of the Board, states:—



"They were therefore under a legal obligation to exercise the same degree of care, towards the preservation of the goods entrusted to them from injury, which might reasonably be expected from a skilled storekeeper, acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality; and that obligation included, not only the duty of taking all reasonable precautions to obviate these risks, but the duty of taking all proper measures for the protection of the goods when such risks were imminent or had actually occurred."

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And again at the bottom of the following page:—

"It would be very dangerous doctrine, for which there is not a vestige of authority, to hold that a depositor of goods for safe custody, who, by himself or his servants, has had an opportunity of observing certain defects in the storehouse, must be taken to have agreed that any risk of injury to his goods which might possibly be occasioned by these defects should be borne by him, and not by his paid bailee. The authorities relating to the vexed maxim "Volenti non fit injuria" have no bearing whatever upon the point. From the very nature of the transaction the depositor is entitled to rely upon the care and skill of his bailee. The duty is incumbent upon the latter, in the due fulfilment of his contract, of considering whether his premises can be safely used for the storage of explosives or other goods, and, if they cannot, to take immediate steps for placing the goods in a position of safety. If the defects of these Government magazines were as apparent to the servants of the appellant company as the jury have found they were, they ought to have been equally patent to the official storekeeper, with whom the duty of safe custody rested."

See also the language used by the same tribunal in the case of *Welden v. Smith*, [1924] A.C. 484, at the top of p. 493.

Whether or not it has been affirmatively established, beyond any doubt, that the defendants failed to exercise reasonable care in the existing circumstances, I am fully convinced that there is no room for doubt that the defendants have failed to satisfy the onus resting upon them, as bailees.

The defendants contend, however, that, even if they, or their servants, were negligent, yet they are relieved from liability by the special terms of their contract. Bearing upon this contention, there are two documents, exhibits 5 and 8, the former being the dock-order given by the plaintiffs, and the latter containing the defendants' general rules and regulations, to which the dock-

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 1929. material, reads as follows:—

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“Muir Bros. Dry Dock Company Limited.

“All agreements contingent upon strikes, accidents, and other causes beyond our control.

“Established 1850. Telephone 60.

“Dry Docks and Shipyard. Ship Building and Repairing.  
 Port Dalhousie, Ont.

“Dock Order:—To Muir Bros. Dry Dock Co. Ltd.

“Please arrange to dry-dock which  
 we agree to keep floating above your blocks until you have her  
 placed and we agree to use your dry-dock subject to your rules,  
 regulations, and conditions prevailing.”

It will be noted that this dock-order is on a form prepared and provided by the defendants.

The material part of the rules and regulations is in the following words:—

“Muir Bros. Dry Dock Co. Limited, Port Dalhousie, Canada.

“Rules and regulations governing dry-docking and repairing of vessels (effective November 1, 1924).

“General:

“The drydocking and repairing of vessels are undertaken by the company in good faith, but subject to the prevailing conditions, in respect to outside water-levels, accidents, weather, labour shortages, strikes, and other contingencies which may delay the work and with the express understanding that the company cannot be held responsible for such delays, or for thefts, injuries to members of the crew, or to the vessel itself.”

It is argued on the defendants' behalf that, as a bailee for hire or reward is liable only for negligence in respect of the article bailed—the limitation of their liability provided for in their rules, etc., must cover negligence. The opinion of the learned trial Judge is summed up in these words:—

“Then the clause goes on to make the dry-docking and repairing subject to the express understanding that the defendants cannot be held responsible for the delays mentioned, or for thefts, injuries to members of the crew, or to the vessel itself. The words relied upon are, of course, “injuries to the vessel itself.” In those words there is no express exception of injuries caused by the negligence of the defendants, and I think that the cases

make it reasonably plain that, unless the contract is very clear, unless it is quite certain that the parties contracted that the bailee should not be liable for negligence, he remains liable for the negligence of his servants, in spite of general words used in this clause.

"Therefore, I think that the clause is no answer to the plaintiffs' claim."

Had this language been used in the case of a common carrier, I would be prepared to endorse it as a correct statement of the law, but, when used, as in the present instance, with respect to a defendant who is not a common carrier (nor acting as such), with great respect, I think the statement is in some respects broader than the authorities will support.

In considering this question there are two general rules of construction applicable and which must be kept clearly in mind. One is, that language to be effective to exempt from liability for negligence must be clear and unambiguous; and the other, that the language upon which the exemption from such liability is claimed will be strictly construed. The cases and authorities hereafter cited on other phases of the matter will be found to support the above statements. At one time there seems to have been a difference of judicial opinion upon the question whether there should be any distinction between common carriers and ordinary bailees, when the language of the exemption clause was being applied to the facts of the particular case. The better opinion now seems to prevail that such a distinction should be recognised. The ground for the distinction appears to be that, as carriers are liable otherwise than for negligence only, and ordinary bailees are liable for negligence alone, an exemption clause, expressed in general words, may be effectual in the case of the latter, because otherwise it would have no meaning; whereas, in the case of the former (the carrier), the general words could be applicable to his liability otherwise than as for negligence, and therefore the clause, being strictly interpreted, and not explicitly relieving him from liability for negligence, he is not to be so relieved.

*Vide Rutter v. Palmer*, [1922] 2 K.B. 87, where Bankes, L.J. (at p. 90), says:—

"A common carrier is liable for the acts of his servants whether they are negligent or not; an ordinary bailee is not liable for the acts of his servants unless they are negligent. If a common carrier would protect himself from responsibility for all acts of his servants he must use words which will include those

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acts which are negligent; because words which would suffice to protect him from liability for acts properly done by his servants in the course of their service may fall short of protecting him from their negligent acts. But if an ordinary bailee uses words applicable to the acts of his servants, inasmuch as he is not liable for their acts unless negligent, the words will generally cover negligent acts, although such acts are not specially mentioned, because otherwise the words will have no effect."

Scrutton, L.J. (at p. 92):—

"In construing an exemption clause certain general rules may be applied: First the defendant is not exempted from liability for the negligence of his servants unless adequate words are used; secondly, the liability of the defendant apart from the exempting words must be ascertained; then the particular clause in question must be considered; and if the only liability of the party pleading the exemption is a liability for negligence, the clause will more readily operate to exempt him: *Reynolds v. Boston Deep Sea Fishing and Ice Co.*, 38 Times L.R. 429. This was a contract by a garage keeper to sell a car on commission. To induce a purchaser a trial of the car may be necessary, and that involves the driving of the car by the servants of the garage keeper. What is his liability in these circumstances? He is only liable for his own negligence and the negligence of his servants. If an accident happened without his negligence or that of his servants he would not be liable; but if it happened through his or his servants' negligence he would be liable."

Atkin, L.J. (at p. 94):—

"I accept the proposition that if a party to a contract would exempt himself from liability he must express himself in plain words. There is a class of contracts in which words purporting in general terms to exempt a party from 'any loss' or to provide that 'any loss' shall be borne by the other party, have been held insufficient to exempt from liability for negligence. Those are contracts of carriage by sea or land. The liability of the carrier is not confined to his acts of negligence or those of his servants; it extends beyond liability for negligence; therefore when a clause in the contract exempts the carrier from any loss it may have a reasonable meaning even though the exemption falls short of conferring immunity for acts of negligence. That is the reason at the root of the shipping cases."

See also *Reynolds v. Boston Deep Sea Fishing and Ice Co.*, 38 Times L.R. 429, a decision also of the Court of Appeal but differently constituted.



See also *Forbes Abbott and Lennard Ltd. v. Great Western Railway Co.*, 44 Times L.R. 97. This case is also of interest, because the defendants were owners of the Chelsea dry-dock, in which the plaintiffs' vessel was injured, the lock, upon the sill of which the vessel was damaged, being held to be a part of the dock, and being the defendants' property. The clause upon which the defendants relied as effectual to exempt them from liability for negligence was expressed in these words: "All barges or vessels while in Chelsea Dock are at the sole risk of owners or persons bringing or causing the same to be brought into the dock." Held, that these words were adequate to exempt the defendants.

The rule of construction applicable in the case of carriers, as above stated, was applied by Sankey, J., in *Turner v. Civil Service Supply Association*, [1926] 1 K.B. 50, and the distinction is recognised by Horridge, J., in *Fagan v. Green and Edwards Ltd.*, *ib.* 102.

Had the plaintiffs' scow, therefore, been in the defendants' dry-dock when she suffered damage, I would have felt constrained to hold that, as the defendants were not common carriers, and were liable only for negligence, the language of the exemption clause, although general in its terms, yet should be interpreted as covering negligence by the defendants or their servants, because there was no other liability to which it could be applicable. But the scow was not in the dry-dock, nor was she even upon or within the defendants' premises.

The form of order (exhibit 5) prepared by the defendants, and by which the plaintiffs were to be bound, was in the nature of a request to "dry-dock" the scow, coupled with an agreement by the plaintiffs—"We agree to use *your dry-dock* subject to *your* rules, regulations, etc." The contract itself specifies that it was the "use of the dry-dock" that was to be subject to the rules and regulations, and the defendants, who prepared the order for the plaintiffs' signature, cannot now be heard to say that they meant their rules and regulations and their exemption from liability for negligence to govern and be effectual in respect of this scow, no matter where they might choose to take her.

If the rules and regulations are to form part of the contract between these parties, then the two must be read together, and it seems to me to be beyond any reasonable doubt, reading the language used, and each part in its bearing upon the whole, that the scow was to be dry-docked for the purpose of being repaired, and that in and during such use of the dry-dock the defendants were

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to be exempt from liability as in the writing provided. The order signed by the plaintiffs was for the use of the dry-dock, and expressly provided that such use was to be subject to the defendants' rules, etc. The written contract contains no reference to or suggestion of the doing of work anywhere else; and, even if there were any definite and satisfactory evidence of any verbal and binding arrangement for the completion of the repairs elsewhere, I doubt if such evidence would be admissible to vary the written contract, nor would it make the defendants' rules governing the use of the dock apply to the repairing of the scow, wherever the defendants, for their own convenience and advantage, might choose to place her. Furthermore, if the defendants claim exemption from liability for the consequences of their negligence committed elsewhere than upon their own premises, they must bring forward a contract so providing, in clear and unambiguous language. In my opinion, they have not done so in the case at bar. That which they have put forward contemplates the using of the dry-dock, which is governed by certain rules. The rule relied upon to exempt the defendants must be strictly construed, and, in this regard, the language of the contract, if it be vague or ambiguous, will be construed against the defendants: *vide* Beven on Negligence, 2nd ed., at foot of p. 1303 and top of p. 1304, and foot-notes. See also *Trainor v. Black Diamond Steamship Co.* (1889), 16 Can. S.C.R. 156, at p. 163, where Ritchie, C.J., says:—

"I think to enable the shipowner to contract against the effect of his own, that is his servants negligence, the contract should be so clear and unambiguous as not to be open to any reasonable doubt as to the intention of the parties; if not made so clear, the construction should be against the shipowner and in favour of the shipper."

See also his quotation from Lush, J., on p. 166; also Strong, J., at p. 172, as follows:—

"It is no doubt a well established and sound rule of construction that the exception of liability for the negligence of the crew and other persons for whose acts the owner is, by the general law, responsible, should be provided for in the most plain and unequivocal terms, and that all doubtful or ambiguous clauses should be strictly interpreted against the owner for whose benefit they are introduced into the contract."

Two decisions in the English Courts, although not on all fours with the case at bar, are helpful in its determination upon this point. The one case, *The City of Edinburgh*, [1921] P. 70, and

274 in appeal, was a case in Admiralty, in which a special limitation, by statute, of the liability of dock-owners for damage suffered by any vessel, was held to be applicable only where the damage was suffered upon or within the premises of the dock-owners. The plaintiffs in that case sought a decree limiting their liability on the ground that they owned a dock at Garston, although the damage was suffered at the Chelsea dock, where the plaintiffs were doing the repairs; it was held that the exemption should be limited strictly to the area of their own dock, and could not extend to a case in which they were doing repairs elsewhere. That case it considered by the House of Lords in *Owners of S.S. Ruapehu v. R. and H. Green and Silley Weir Ltd.*, [1927] A.C. 523, which was the converse, the Court holding that, the damage having been suffered in the dock, the owners of the dock were entitled to the benefit of the statutory limitation of liability, notwithstanding that they were, at the time, doing work as repairers, rather than as dock-owners. Their Lordships make it perfectly clear that the right to the limitation of liability did not depend upon the quality of the act causing the damage, but depended upon the geographical area within which it was done. The words of the statute are:—

“The owners of any dock (which by subsec. 4 includes dry-docks) “shall not, where without their actual fault or privity any loss or damage is caused to any vessel . . . be liable to damages beyond an aggregate amount not exceeding eight pounds for each ton of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring, is, or within the period of five years previous thereto has been, within the area over which such dock . . . owner . . . performs any duty or exercises any power.”

It will be seen at once that the section does not explicitly read, “damage is caused to any vessel within their dry-dock,” etc.; but the Court held that this was to be inferred from the context. That, in my opinion, is the reasonable and proper interpretation to be placed upon the language used in the case at bar, and, as the damage to the scow was suffered in the reach of the canal, outside of the defendants’ dock and premises, where the scow had been moored by the defendants for their own convenience, I think the dock rules and regulations limiting their liability had no application.

The language used by Lord Watson in *Brabant v. King* (*supra*) disposes of any suggestion that the knowledge by the

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plaintiffs' employee of the mooring of the scow by the defendants outside the dock could have any effect upon the defendants' liability. There was no evidence whatever of any parol agreement that the dock rules should be made to apply in respect of the outside mooring.

My conclusion therefore is that the defendants must be held liable for the damage sustained.

The only question remaining is as to the \$900, which amount was spoken of as a profit made by the plaintiffs on the raising of the scow. The insurance underwriters who were liable to the plaintiffs for the loss, and for whom this action is brought, asked for tenders for the raising of the scow. Several firms tendered, the plaintiffs among the number, and their tender was accepted.

Before proceeding to do the work, the plaintiffs wrote the defendants (*vide* copy of letter of the 28th, March, 1927, in exhibit 6) advising that their tender had been accepted, and offering to let the defendants undertake the work, which the latter refused.

The plaintiffs then proceeded with the job, pursuant to a new contract with the underwriters, and in so doing their manager thinks they may have made a profit of about \$900. The defendants' contention is, that the plaintiffs were bound to take all reasonable steps to minimise their loss, and therefore should account and allow credit for the profit so made.

The duty devolving upon the plaintiffs to minimise their loss required them only to do what should be done by a reasonably prudent man in the ordinary course of business. Having taken out a policy of insurance, for which they had to pay premiums, the plaintiffs were under no obligation to do more than call upon the insurers to make good their loss, and they did so. The defendants had nothing to do with this, and were not entitled to obtain any benefit from it. Having undertaken to indemnify the insured, the underwriters, for their own protection, proceeded to have the scow raised, and took the proper steps by asking for tenders. The plaintiffs were under no obligation to put in a tender, and owed no duty in respect thereof, either to the defendants or even to the underwriters themselves; and, in my opinion, the defendants have no more right to ask whether the plaintiffs made any profit on this new contract than they would have had if the contract had been made by strangers. The distinction to be drawn between the cases, and the principle upon which it is based, are clearly stated by Haldane, L.C., in *British Westinghouse Electric and Manufacturing Co. Ltd. v. Under-*



*ground Electric Railways Co. of London Ltd.*, [1912] A.C. 673, at p. 690, where he uses the following language:—

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“Recent illustrations of the way in which this principle has been applied, and the facts have been allowed to speak for themselves, are to be found in the decisions of the Judicial Committee of the Privy Council in *Erie County Natural Gas and Fuel Co. v. Carroll*, [1911] A.C. 105, and *Wertheim v. Chicoutimi Pulp Co.*, [1911] A.C. 301. The subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business. This distinguishes such cases from a quite different class illustrated by *Bradburn v. Great Western Railway Co.* (1874), L.R. 10 Ex. 1, where it was held that, in an action for injuries caused by the defendants’ negligence, a sum received by the plaintiff on a policy for insurance against accident could not be taken into account in reduction of damages. *The reason of the decision was that it was not the accident, but a contract wholly independent of the relation between the plaintiff and the defendant, which gave the plaintiff his advantage.*”

I am therefore of opinion that the conclusion of the learned trial Judge is right, and that the defendants’ appeal should be dismissed with costs.

MULOCK, C.J.O., and MAGEE, J.A., agreed with GRANT, J.A.

HODGINS, J.A.:—I have had the advantage of reading the able and comprehensive judgment of my brother Grant in this case, with which I substantially agree, except on one point. I think that the evidence does not support the conclusion that the defendants ought to have known or foreseen the possible action of all four sources of supply, some of them natural, others governed mechanically. These four sources are: (1) from the present canal, through docks; (2) discharge from the Cataract Power Company’s plant; (3) natural flow from Twelve Mile creek; (4) from the old canal itself.

The area in which the defendants operate their dock and in which the scow was moored belongs to the Government of the Dominion, and is in no way, nor are its sources of supply, in the control of the defendant company. To hold as I have indicated might have a far-reaching effect on other cases, and I do not think that its decision is essential to the disposition of the present

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appeal. There is, besides, the disputed point as to whether the valves admitting water into this area under the lock-keeper's control, which he had shut down, were afterwards opened so as to allow the water to flow into it. At present it is only supported by his own testimony and should have been more fully examined into.

The scow was found in a sunken condition at 8 a.m. on Sunday. It had been moored on the 11th December, 1926, at the spot where it sank. This was the first winter season, the lock-gates having been cut down in the spring of the same year. In previous seasons the weir operated to control the height, so that no one had had experience in a winter season after that regulating check had been removed nor had they any double holiday in that period. The extent of the drop in the water is not easy to estimate accurately, judging from the conflicting figures given, but it is clear that the drop, whatever it was, occurred before 8 a.m. on Sunday, and would not begin till some time on Saturday afternoon, which was Christmas-day. Therefore, in discussing the probable outlook, it must be remembered that the length of time in which the water receded sufficiently to sink the scow was only about, say, 16 hours—from before 4 p.m. on Saturday, or somewhat earlier, till a time prior to 8 a.m. on Sunday, and not two full days, as was insisted upon on the argument. I do not find any convincing evidence that an abnormal fall had occurred before the actual sinking took place.

At 4 p.m. on that day, Saturday (Christmas-day), there was a drop of about 10 inches from a height of 7 inches above normal on Friday night. The plaintiffs' witness Perry puts the normal week-end drop at "around about 12 inches;" Curry, the dock-master, says 24 inches, but he does not state that he means 24 inches below normal; so that on Perry's statement there was only 5 inches less than the normal height at 4 p.m. on Saturday. The height above normal is not a material fact, except that when it occurs it is necessary to deduct it from any calculations not based on the normal line. It is the drop below normal that is important in determining reasonable care. The witnesses put the drop on Sunday morning at various figures, 12 to 18 inches (by Hoover, overseer of the canal for 7 years, recognised by my brother Grant as disinterested), 21 inches (by Curry the lock-master); 18 inches (by Hara, engineer of the canal, even on a double holiday week-end); 18 to 20 inches (Perry), which he thinks unusual.

It was said that the scow was repaired so as to keep it watertight up to 22 inches from the bottom, and none of the figures I have quoted shew that that height had been reached. But a fall of only 10 inches (according to Perry), 17 inches (Little, the defendants' foreman), 22 inches (Ansell, the defendants' superintendent), 18 inches (Kuchenbecher), would endanger the scow. It was so moored that the side nearest the bank was 14 feet out from it where the under-water bank had a considerable slope, so much so that in case the scow fell with the falling water, it would inevitably cause the other side to sink, owing to the weight of machinery on that side, while the inner side would rest on the sloping bank. There was only 15 inches below the bottom of the scow, and it was submerged to about 3 inches on the side next the bank. So that, if the water sank 15 inches, it would ground on its inner side, and it had only 19 inches of freeboard there. If the 15 inches included water higher than the normal level, the margins are much narrower. That was a dangerous position for any craft to be placed in, where there was any danger of a drop in the water, and I think the defendants ought to have apprehended that by the lowering of the water such a berth would become, if it was not always to be considered, a dangerous one. The normal drop would overcome the freeboard or come so near doing so that I cannot understand why the defendants took the risk they did.

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The rule of responsibility which I think attaches in this case may be gathered from the analogy afforded by that in the cases collected in a dissenting judgment in *Great Lakes Steamship Co. v. Maple Leaf Milling Co.* (1923), 54 O.L.R. 174\*, where the responsibility of dock-owners and others who invite vessels to use the berth at their dock, or at one under their control, is laid down. That responsibility is put in one of the cases thus:—

“Reasonable care to see whether the berth, which is the essential part of the use of the jetty, is safe, and if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so” (*per* Bowen, L.J., in *The Moorcock* (1889), 14 P.D. 64, at p. 07, cited at p. 192 of 54 O.L.R.)

As bailees, the defendants were entitled to move the scow from their dry-dock, and to moor it afloat, but I think they were bound to anticipate some lowering of the water, and to have left

\* The dissenting judgment was approved by the Privy Council in *S.C.* (1924), 41 Times L.R. 21.

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it to float with a sloping bank under it, so that, in case of a drop in the level under ordinary week-end conditions, one side would ground before the other, was, to my mind, to place it in an unsafe position.

Upon this ground, I think the appeal must be dismissed with costs.

*Appeal dismissed.*



## [APPELLATE DIVISION.]

ERIE BEACH CO. LTD. v. ATTORNEY-GENERAL FOR ONTARIO.

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*Succession Duty—Shares in Ontario Company Held by Foreigner Domiciled in Foreign State—Provisions of Ontario Succession Duty Act and Companies Act—Nature of Duty—Probate or Estate—"Mobilia Sequuntur Personam"—Constitutional Law—Indirect Taxation.*

The judgment of LOGIE, J. (1927), 61 O.L.R. 507, was reversed on appeal, the appellate Court holding that the situs of the shares in question is in Ontario; that the duty imposed by sec. 7 of the Succession Duty Act, R.S.O. 1914, ch. 24, though called a succession duty, is a duty in the nature of a probate or estate duty; that the maxim *mobilia sequuntur personam* is not applicable; that the shares are subject to taxation under the Act; and that sec. 10 does not impose indirect taxation, and is *intra vires* the Ontario Legislature.

Sections 6, 7, 8, and 10 of the Succession Duty Act, and secs. 56, 60, and 61 of the Companies Act, R.S.O. 1914, ch. 178, considered.

Review of the authorities.

*Winans v. Attorney-General*, [1910] A.C. 27, and *Rex v. Lovitt*, [1912] A.C. 212, applied and followed.

*Smith v. Provincial Treasurer of Nova Scotia* (1919), 58 Can. S.C.R. 570, and *Attorney-General for Ontario v. Baby* (1926), 59 O.L.R. 181, 60 O.L.R. 1, explained and distinguished.

*Per* MULOCK, C.J.O.:—The question whether the shares are chargeable with the duties claimed is a question really between the executors of the deceased shareholder and the Crown, and the plaintiff company is not entitled to maintain the action, as constituted, the executors not being parties to it.

*Per* HODGINS, J.A.:—The plaintiff company, having issued certificates of ownership to B's executors, had taken possession of and administered the shares, and the same, as well as the plaintiff company, were liable for duty under the Act.

AN appeal by the defendant from the judgment of LOGIE, J., 61 O.L.R. 507.

April 13 and June 5 and 6, 1928. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and GRANT, J.J.A.

*Edward Bayly*, K.C., for the appellant. The Ontario Companies Act, R.S.O. 1914, ch. 178, sec. 118, refers to, although it does not specifically mention, the share-register. If the head office is in Ontario and the share-register is kept there, the by-laws of the company make the head office in Ontario the only place where the shares can be transferred, since no transfer agents have been appointed in the State of New York. The situs of the shares must therefore be in Ontario: *Attorney-General v. Higgins* (1857), 2 H. & N. 339. Under sec. 10 of the Succession Duty Act, R.S.O. 1914, ch. 24, the tax is a personal duty. This section must be read with sec. 18 of the same Act, under which the

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executor is made personally liable. Section 10 provides a penalty for the infraction of the statute, which cannot be transferred to the beneficiary. The tax becomes indirect only where there is a legal liability on the beneficiary to recoup. No recoupment could have been contemplated by the Legislature, because, under our law, no recoupment could be enforced. Reference to *City of Halifax v. Fairbanks' Estate*, [1928] A.C. 117; *Attorney-General for British Columbia v. Canadian Pacific Railway Co.*, [1927] A.C. 934; *McLeod v. City of Windsor*, [1923] S.C.R. 696; *City of Windsor v. McLeod*, [1926] S.C.R. 450; *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575; *Treasurer of Ontario v. Canada Life Assurance Co.* (1915), 33 O.L.R. 433.

*A. W. Marquis*, K.C., and *D. F. Pepler*, on the same side. The head office of the company being in Ontario, under the Act and under the company's own by-laws that was the only place where the shares could be transferred, and therefore the situs of the shares is in Ontario. The transfer does not become legal until it is entered in the books of the company at the head office in Ontario. There is no such thing as a transfer office unless it is a legal transfer office, and such could not be established outside Ontario without permission.

*A. Courtney Kingstone*, K.C., for the plaintiff company, respondent. The situs of the shares is in the State of New York, and they are therefore not taxable by the Province of Ontario. This is a private company which had obtained permission to hold its meetings outside the Province, and the shares of which cannot be transferred without the consent of the directors. All business is and always has been actually carried on outside of Ontario, including the approval of the transfer of shares. In this the company was quite within its rights: *Brassard v. Smith*, [1925] A.C. 371, at p. 376. Under the Ontario Companies Act, all that the company had to do was to keep in Ontario a book with the names of the shareholders, available for the general information of the public. There is nothing in the Act requiring the transfer-book to be kept at the head office of the company. Reference to the Ontario Companies Act, R.S.O. 1914, ch. 178, secs. 52, 54 (2), 56(1), (2), 58, 60, 118, 119(1), (2), (3). The transfer of shares is effectual without being entered in the book kept within Ontario: clause 22 of the by-laws of the company. The really effective dealing with the shares is the resolution passed by the directors authorising the transfer. The share-certificate of a private company is not *primâ facie* evidence of the title because title cannot be made or effectively dealt with until the directors'

resolution of approval has been passed. Therefore the shares are not situate in Ontario, but in the State of New York, where the final act to effect the title took place: *Re Phillips and La Paloma Sweets Ltd.* (1921), 51 O.L.R. 125; *Crosby v. Prescott*, [1923] S.C.R. 446; *Re Green and Flatt* (1913), 29 O.L.R. 103. In any event, subsec. 2 of sec. 10 of the 'Succession Duty Act (added by 15 Geo. V. ch. 13, sec. 7), imposes indirect taxation, and is therefore *ultra vires*.

[Other points dealt with on the argument and cases cited are referred to in the judgments, *infra*.]

January 14, 1929. MULOCK, C.J.O.:—This is an appeal from the judgment of Logie, J., in favour of the plaintiff company. The facts are as follows:—

The plaintiff company obtained a charter of incorporation under the provisions of the Ontario Companies Act, whereby it became entitled to carry on, in the said Province, an amusement business, and for that purpose to acquire and hold real and personal estate, its head office to be in the village of Fort Erie, in the said Province.

Under the terms of an agreement made between the company and one V. E. Bardol, in consideration of the issue by the company to Bardol of 1,000 common shares and 9,000 preference shares in the company, Bardol sold and conveyed to the company certain property, and at his request the company issued 4 of the said common shares to his nominees, and 96 of the said common shares to himself, and deferred issuing to him the balance of the shares, and they remained unissued at the time of his death. He was then domiciled in the city of Buffalo, in the United States of America. He died testate, and probate of his last will and testament was granted by the Probate Court of the County of Erie, in the State of New York, to the executors therein named. Thus his position as a shareholder in the company then was: that he owned the 96 common shares and as against the company was entitled to have issued to him the balance, namely, 9,000 preference shares, and 900 common shares, and his executors requested the company to issue to them the said unissued shares, and to do all things necessary in order to their becoming duly registered holders of 996 common shares and 9,000 preferred shares. This the company is desirous of doing, but for the reasons hereinafter mentioned has not done.

His Majesty the King, representing the Province of Ontario, claimed to be entitled to payment of certain duties under the

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Succession Duty Act and amendments, in respect of all of the said shares, and notified the plaintiff company that it would be held liable for payment of such duties, if it permitted a transfer of such shares upon its books until the duties were paid or security for payment was given; whilst the executors notified the plaintiff company that they did not admit liability of the company in respect of the duties so claimed. Under these circumstances the plaintiff company brought this action, wherein it claims to be entitled to permit transfer of the said shares to the executors without thereby incurring any liability in respect of the duties, and contends that the shares are not subject to succession duty, and it asks for the following declarations:—

(a) That the said shares are not subject to payment of the duties claimed.

(b) That the plaintiff company is entitled to accept and record on its books or otherwise deal with a transfer of the said shares without being required to insure payment of the said duties.

(c) That the plaintiff company would not be liable for such duties in the event of its accepting and recording on its books a transfer of the said shares.

The defendant controverts these various claims of the plaintiff company, and asks that it be prohibited from allowing a transfer of the shares until the duty claimed is paid.

The effect of the learned trial Judge's judgment is that the plaintiff company is entitled to the declarations asked for.

Having regard then to the case thus presented by the plaintiff company, the first question which suggests itself to me is: To what relief, if any, is the plaintiff company entitled? The claim of the Crown is not against the company but against Bardol's executors.

So far as appears, the plaintiff company has done nothing which renders it liable to the Crown in respect of the duties claimed, nor has it any cause of action against the Crown. The real question involved in the declarations sought is whether the shares are chargeable with the duties claimed. That is a question solely between the executors and the Crown, and the plaintiff company is not entitled, in an action constituted as here, to raise it. The executors are not plaintiffs or parties to the action and would not be bound by any judgment which this Court might deliver.

For these reasons, I am of opinion that the plaintiff company is not entitled to maintain this action.



The costs incurred have been considerable, and it would be regrettable if the action should prove barren of results and the costs be thrown away because of its not being properly constituted. All the counsel before us appeared desirous of the Court dealing with the questions raised on their merits, and it may be possible, by adding parties and by other amendments, to reconstruct the case in such a way as would enable the Court to entertain it. I would therefore, for that purpose, advise that judgment be withheld for a month.

Assuming, however, that, as the case is now constituted, the Court ought to pronounce upon the questions involved in this appeal, I will proceed to deal with them, and, first, with the one whether the Crown is entitled to any duty in respect of the said shares.

To be so entitled, it is essential that their "situs" be deemed to be in Ontario, and that the duty be a charge on the shares as distinct from a charge against the beneficiaries upon their accession to them. There are numerous authorities as to what determines the situs of a chose in action, and it is sufficient to refer to a few of them.

In Dicey on Conflict of Laws, 3rd ed., p. 342, the following maxim is laid down:—

"Debts, choses in action, and claims of any kind must be held situate at the place where the debtor or other person against whom a claim exists resides; or, in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced."

*Attorney-General v. Higgins*, 2 H. & N. 339, was the case of an information against the executors of a deceased person for not exhibiting an inventory properly stamped in the Commissary Court of Scotland of certain railway shares in railway companies in Scotland. The deceased, at the time of his death, was domiciled in England, and probate of his will issued there, and his executors, on production of the probate before the various companies in Scotland, procured their names to be entered in the register of shareholders in place of that of the deceased, but did not, as required by statute, exhibit before the Commissary Court an inventory duly stamped in respect of the said shares—that is, did not pay the tax in respect thereof. It was argued there, as here, that, because of the doctrine "*mobilia sequuntur personam*," the "situs" of the shares was not in Scotland, but in the country of domicile of the deceased, and that the executors were entitled without payment of the tax to have their names substituted for

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that of the testator in the share-register, but the Court held that, the register of shareholders being in Scotland, the change of title could be evidenced only by entries in the register there, and that therefore the situs of the shares was in Scotland, and the duty in respect thereof was payable in Scotland.

*Attorney-General for Ontario v. Newman* (1899), 31 O.R. 340, was an action to recover succession duties upon deposit receipts issued by the banks in England payable to a person domiciled in a foreign country at the time of his death. The Succession Duty Act then in force did not differ from the Ontario Act now under consideration, and the trial Judge, Boyd, C., at pp. 344, 345, says:—

“The payment of duties extends to all property situate within this Province, whether the deceased owner was domiciled in Ontario at the time of his death or not. The payment of the tax is charged upon the property and made payable by the administrator before being delivered by him to the beneficiary’s next of kin . . . The distinctive feature of the succession duty legislation is to impose the payment of the duty as primary charge upon and out of the corpus of the estate by the personal representative before the assets are distributed.”

This view was affirmed in appeal in 1901 (1 O.L.R. 511).

In *Pullman’s Palace Car Co. v. Pennsylvania* (1890), 141 U.S. 18, 22, Mr. Justice Gray quotes with approval from Mr. Justice Storey’s Conflict of Laws, sec. 550, as follows:—

“Although movables are for many purposes to be deemed to have no situs, except that of the domicile of the owner; yet, this being but a legal fiction, it yields whenever it is necessary for the purpose of justice that the actual situs of the thing should be examined. A nation within whose territory any personal property is actually situate has as entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there.”

And Mr. Justice Gray adds:—

“For the purpose of taxation, as has been repeatedly affirmed by this Court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the State which imposes the tax.”

In *Winans v. Attorney-General*, [1910] A.C. 27, Winans at the time of his death was domiciled in the United States, and owned certain bonds which were physically situate in the United Kingdom. They were payable to bearer, and passed by delivery.

Section 1 of the Finance Act, 1894, then in force declared that "there shall . . . be levied and paid, upon the principal value . . . of all property . . . real or personal . . . which passes on the death . . . a duty called 'estate duty;'" and it was held that the language of that section made the duty a charge on the corpus of the estate before distribution. Lord Loreburn, L.C., said (p. 30):—

"Legacy and succession duties fall upon the benefits received by survivors on their accession upon a death. Estate duty falls upon the property passing upon a death, apart from its destination. . . . The class of property once liable to the one duty" (probate) "is now liable to the other" (estate), "and both proceed not upon any assessment of benefit arising upon the death to this or that particular person, but upon the value of the property which passed upon the death of the deceased.

"Accordingly the principle broadly true, that domicile governs the liability to legacy and succession duties, has, as to personality within the jurisdiction, no concern with the estate duty as it had no concern with the probate duties . . . In both cases the property received the full protection of British laws—which is a constant basis of taxation—and can only be transferred from the deceased to other persons by the authority of a British Court."

In the same case Lord Atkinson thus expressed himself (pp. 31 and 32):—

The bonds "being physically situated in England at the time of their owner's death, they were subject to English law and the jurisdiction of English Courts, and taxes might therefore *primâ facie* be levied upon them . . . There does not appear, *â priori*, to be anything contrary to the principles of international law, or hurtful to the polity of nations, in a State's taxing property physically situate within its borders, wherever its owner may have been domiciled at the time of his death. That principle is not, however, acted upon in the case of legacy and succession duties . . . In these cases the principle of "*mobilia sequuntur personam*" is applied." And at pp. 34 and 35: "Both duties are required to be paid by the executor before probate is granted to him, and in neither case are officers of the revenue concerned with the ultimate devolution of the property, or with the fact that in the ultimate adjustment of the estate each beneficiary may have to pay some duty on the benefit he receives . . . *Primâ facie*, therefore, estate duty would be payable in respect of assets upon which probate duty would formerly have been payable, and . . . estate duty would also be payable upon the assets mentioned therein

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 York Breweries Co. v. Attorney-General*, [1899] A.C. 62.”

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 Co. LTD.  
 v.  
 ATTORNEY- In the same case Lord Shaw of Dunfermline thus expressed  
 GENERAL himself (p. 47):—  
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Legacy and succession duties “are duties upon the accession  
 to property by legatees and successors, and the levy of them is,  
 in my opinion, an incident of such accession, meant to have been  
 governed under the law of the domicile of the deceased which regu-  
 lates the distribution of his personal estate. Estate duty is of a  
 different character; the levy and payment thereof occur not at  
 the point of accession to property, but of the passing of property  
 by the death of a testator.”

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In *Rex v. Lovitt*, [1912] A.C. 212, the testator at the time of  
 the death was domiciled in the Province of Nova Scotia and was  
 possessed of a sum of money deposited in the New Brunswick  
 branch of the Bank of British North America, the head office of  
 which was in London, England, and it was held that, for the pur-  
 poses of legal representation and collection, the situs of the in-  
 debtedness of the bank was in New Brunswick, and that duty  
 thereon was payable in New Brunswick.

In *Brassard v. Smith*, [1925] A.C. 371, a person, resident and  
 domiciled in Nova Scotia, died in that Province owning shares  
 in the Royal Bank, whose head office was in Montreal, but which  
 had statutory power to maintain in any Province a registry office  
 at which alone shares held by residents in that Province were to  
 be registered and could be validly transferred. The shares were  
 registered at an office maintained by the bank at Halifax under  
 the statutory power above mentioned, and it was held that, as the  
 ownership of the shares could be effectively dealt with only in  
 Nova Scotia, they were not properly situate in Quebec, and the  
 claim of Quebec could not be maintained. Lord Dunedin, who  
 delivered the judgment of the Committee, in dealing with the  
 question how the person entitled should obtain title to these  
 shares, said (p. 376):—

“That is done by transfer, and that transfer in such a case  
 is effectuated by a change in the register where the shares are  
 registered, that is in this case in Nova Scotia. Their Lordships  
 consider that the question was really settled by *Attorney-General  
 v. Higgins (ante)*. Baron Martin in that case says in so many  
 words: ‘It is clear that the evidence of title to these shares is the  
 register of shareholders, and, that being in Scotland, the property  
 is located in Scotland.’” Lord Dunedin quotes the language of



Duff, J., in the Supreme Court of Canada in the *Brassard* case, as follows:—

“The Chief Baron’s judgment, I think, points to the essential element in determining situs in the case of intangible chattels for the purpose of probate jurisdiction as ‘the circumstances that the subjects in question could be effectively dealt with within the jurisdiction.’” To this expression Lord Dunedin says:—

“This is, in their Lordships’ opinion, the true test. Where could the shares be effectively dealt with? The answer in the case of these shares is in Nova Scotia only, and that answer solves the question.”

The Companies Act of Ontario, R.S.O. 1927, ch. 218, determines how shares may be transferred. By sec. 58, they are transferable in the books of the company. By sec. 62, no transfers of shares are valid until entry thereof has been made in the company’s books. By sec. 121, the company is required to keep books shewing who are shareholders, and, by sec. 122, these books must be kept at the head office of the company within the Province of Ontario. Thus Ontario is the only place where the shares in question “could be effectively dealt with.”

Then does the language of the statute make the duty a charge on the corpus?

The Succession Duty Act, R.S.O. 1914, ch. 24, sec. 7, subsec. 1, enacts as follows:—

“The following property as well as other property subject to succession duty upon a succession shall be subject to duty at rates hereinafter imposed:

“(a) All property situate in Ontario and any income therefrom passing on the death of any person, whether the deceased was at the time of his death domiciled in Ontario or elsewhere.”

The Succession Duty Act of New Brunswick, as originally passed, was amended and as amended was held in *Rex v. Lovitt*, [1912] A.C. 212, as above pointed out, to charge the duties thereby established on the corpus of the estate and not on the beneficiaries.

The following is, I think, a correct paraphrase of the section of the New Brunswick Act as amended: “All property, whether situate in this Province or elsewhere, whether the deceased owning or entitled thereto was domiciled in or without this Province at the time of his death, shall be subject to a succession duty to be paid for the use of the Province,” etc.; and then follow provisions fixing the amount of the duty as in the Ontario Succession Duty Act, according to the aggregate value of the property and

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the relationship of the successors to the deceased, and Lord Robson, who delivered the judgment of the Committee, said (p. 223):—

“Although called a succession duty, the tax here in question was laid on the corpus of the property.”

I see no difference in the meaning of the New Brunswick and of the Ontario Act, and therefore the interpretation placed by *Rex v. Lovitt* on the New Brunswick Act applies to the Ontario Act, and the succession duties claimed are, in my opinion, a charge on the shares, and not on the beneficiaries.

Another question raised was that charging a duty, or in other words levying a tax, on the said shares was *ultra vires* of the Province, in that it prevented the application of the principle “*mobilia sequuntur personam*.”

The British North America Act, sec. 92, entitles the Legislature of each Province to make laws in relation to direct taxation within the Province for the raising of revenue for provincial purposes, and also in relation to property and civil rights. “Property” includes choses in action. The situs of the shares in question is in Ontario, not by virtue of any provincial legislation, but of the common law; and, like all other property in Ontario, they are subject to the paramount right of the Province to tax, which right excludes the application to its prejudice of the principle “*mobilia sequuntur personam*.”

Another objection is that sec. 10, subsec. 2,\* imposes indirect taxation, and is therefore *ultra vires*. That subsection penalises a company which permits any property of a deceased person to be transferred to the beneficiary until the duty payable in respect thereof is paid, and a company so penalised is not entitled to recover the penalty from the beneficiary or otherwise. Thus there is no indirect taxation.

For these reasons, I think the appeal should be allowed with costs, and the action should be dismissed with costs.

MAGEE and GRANT, J.J.A., agreed with MULOCK, C.J.O.

HODGINS, J.A.:—Appeal from the judgment of Logie, J., at the trial, in favour of the plaintiff company. This action concerns the liability to pay a tax upon certain shares, under the statute in force at the time of the death of one Bardol, the Succession Duty Act, R.S.O. 1914, ch. 14, and amendments.

\* Subsection 2 of sec. 10 of the Succession Duty Act, R.S.O. 1914, ch. 24, was added in 1925, by 15 Geo. V. ch. 13, sec. 7.

The domicile of Bardol at the time of his death on the 9th April, 1925, was in the State of New York, and the shares owned by him at the time of his decease were shares in the plaintiff company, an Ontario corporation incorporated under the Companies Act by letters patent.

The learned trial Judge held that the shares were not taxable, and gave the plaintiff company the relief it sought, declaring that the shares were not liable to succession duty under the foregoing Act.

The past and present status of the shares is as follows: Bardol conveyed to the plaintiff company lands situate in Ontario, in consideration of 9,000 preference shares, fully paid, and 1,000 common shares, fully paid, of the capital stock, whereby he became entitled to the said shares. None of the preference shares and only 100 of the common shares were actually issued to or at the request of Bardol; of the 100 he received 96. On the 11th August, 1926, 9,000 preference shares were transferred to the executors and trustees of Bardol by the plaintiff corporation, who, on that day, issued a certificate therefor. It recites that the shares were transferable only on the books of the corporation by the holder thereof in person or by attorney, upon surrender of the certificate properly endorsed. A similar certificate as to the 96 common shares was, on the 11th August, 1926, issued in the same way and under the same condition as to transfer to the executors and trustees of Bardol. The liability to taxation of these 96 shares and of the 9,000 preference shares is the subject of this action.

The relevant sections of the Succession Duty Act, R.S.O. 1914, ch. 24, are as follows:—

“7.—(1) The following property as well as all other property subject to succession duty upon a succession shall be subject to duty at the rates hereinafter imposed.

“(a) All property situate in Ontario and any income therefrom passing on the death of any person, whether the deceased was at the time of his death domiciled in Ontario or elsewhere.

“(2) Property passing on the death of the deceased shall be deemed to include for all purposes of this Act the following property,—”

(Here follow certain enumerations not necessary to be considered in this case.)

“8. Subject to the exceptions mentioned in sections 6 and 7 there shall be levied and paid for the purpose of raising a revenue

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for provincial purposes in respect of any succession, or on property passing on the death according to the dutiable value, the following duties over and above the fees paid under the Surrogate Courts Act:—

(Here follows the mode of calculation of the duty under the Act. It is conditioned upon aggregate values and is based on the amount or value received, thereout, thus: "Where . . . . . any property passes in manner hereinbefore mentioned . . . . . the same or so much thereof as so passes . . . . . shall be subject to a duty at the rate on the scale as follows:") The second and fourth subsections of sec. 8 provide for further additional duties under certain circumstances depending on the amount, or the person to whom the property passes. By subsec. 5, this duty is calculated on the value of extra-territorial property which passes. It is as follows:—

"(5) The additional duty provided for by subsections 2 and 4 shall be payable on the property in Ontario, where the deceased dies domiciled elsewhere than in Ontario, but for the purpose of fixing the rate of such duty, the beneficial interest in property out of Ontario passing to the successor or other person on the same death shall be added to the value of the property in Ontario, and nothing in this Act shall be construed to impose any duty, directly or otherwise, on property out of Ontario owned by any deceased person so domiciled."

Section 10 is as follows:—

"(1) No foreign executor shall assign or transfer any bond, debenture, stock or share of any bank, or other corporation whatsoever, having its head office in Ontario, standing in the name of the deceased person, or in trust for him, until the duty, if any, is paid or security is given as required by section 11, and any such bank or corporation allowing a transfer of any debenture, bond, stock or share contrary to this section shall be liable for such duty.

"(2) No property in Ontario belonging to any deceased person at the time of his death or held in trust for him, whether such deceased person was at the time of his death domiciled in Ontario or elsewhere, shall be transferred, paid or given to the person entitled thereto until the duty, if any, is paid or security given therefor, and any corporation or person allowing such property to be so transferred, paid or given contrary to this subsection shall be liable for such duty." (Subsection 2 was added by 15 Geo. V. ch. 13, sec. 7.)



It will be observed that in sec. 7 two classes of property are dealt with, namely:—

(1) All property *situate in Ontario* and any income therefrom passing on the death of any person, *whether the deceased was at the time of his death domiciled in Ontario or elsewhere;*

(2) All other property *subject to succession duty upon a succession.*

On looking at sec. 3, which defines what a succession is, it appears that a "succession" is confined to the right or interest by virtue of such dispositions or devolutions of property as occur on the death of a person domiciled in Ontario, whereby any person becomes beneficially entitled thereto.

The duty, therefore, which, judging by the title of the Act, may be denominated "succession duty," is of two kinds. One is succession duty in the proper sense of that term, and the other approximates to an estate or probate duty. The distinction is put in this way by Lord Loreburn, L.C., in *Winans v. Attorney-General*, [1910] A.C. 27, at p. 30: "Legacy and succession duties fall upon the benefits received by survivors on their accession upon a death. Estate duty falls upon the property passing upon a death, apart from its destination."

Lord Shaw of Dunfermline, in the same case, further illustrates the difference. He says, speaking of succession duties (p. 47):—

"These duties, my Lords, are duties upon the accession to property by legatees and successors, and the levy of them is, in my opinion, an incident of such accession, meant to have been governed under the law of the domicile of the deceased which regulates the distribution of his personal estate. Estate duty is of a different character; the levy and payment thereof occur not at the point of accession to property, but of the passing of property by the death of a testator."

As to the first kind, arising upon the death of a person domiciled in Ontario, the principle of *mobilia sequuntur personam* would apply, and the title of the successor would be dealt with by Ontario law. We have, however, nothing whatever to do with this branch, as the testator in this case died domiciled in the State of New York. It is argued that his estate, so far as it is locally situated in Ontario, is subject to the other class of duty which I have said is similar to an estate or probate duty. The question we have to decide is whether the duty imposed upon "all property situate in Ontario and any income therefrom passing on the death of any person, whether the deceased was at the time of his death domiciled in Ontario or elsewhere," is within the com-

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petence of the Provincial Legislature, and is, though called a succession duty, really one in the nature of an estate or probate duty.

This is a question which was dealt with in *Rex v. Lovitt*, [1912] A.C. 212, on the New Brunswick Succession Duty Act. In that case, after deciding that the actual situs of the property (simple contract debts) was within the Province, the Judicial Committee held (p. 223) that the tax, although called a "succession duty," "was laid on the corpus of the property and the statute made its payment a term of the grant of ancillary probate." Lord Robson examines closely the sense in which movables are said to follow the owner, and his conclusion in the Judicial Committee was that, the Legislature of New Brunswick having expressly enacted that all property situate in the Province should be subject to a succession duty though the testator may have had his fixed place of abode or domicile outside the Province, the maxim referred to was excluded as regards personal estate within the Province belonging to persons domiciled elsewhere. It was further held that the Province by that Act imposed the duty in question as part of the price to be paid by the representatives of the deceased testator for the collection or local administration of taxable property within the Province, and was therefore intended to be a direct burden upon that property, varying in amount according to the relationship of the successor to the testator. In the case at bar, *Rex v. Lovitt* should govern, as the reasoning upon which the decision proceeds is entirely applicable to the Ontario statute, if it is borne in mind that in the Ontario statute succession duty is imposed on a "succession," which is defined in the Act as depending on the death of a person domiciled in Ontario, while there is also a description of the taxable property different from that and made liable because it passes on the death and is taxable, provided it is situate in Ontario, whether the owner was domiciled here or not.

Much reliance was placed on the case of *Smith v. Provincial Treasurer of Nova Scotia* (1919), 58 Can. S. C. R. 570, as deciding, contrary to *Rex v. Lovitt*, that local situs was not the test and that the doctrine that movables followed the owner was the governing rule and could not be set aside by provincial authority. I do not think that, carefully read, these cases conflict, though the Canadian case raises a constitutional question not discussed in *Rex v. Lovitt*, which fortunately does not need to trouble us here.

The Nova Scotia Act referred to in the judgment in the *Smith*

case has not in it the expression found in the Ontario Act, "upon a succession." The Nova Scotia statute says, "all other property subject to succession duty," but does not tax the transmission itself (*per* Anglin, J., at p. 585), whereas the Ontario Act confines the liability to succession duty properly so called to property passing "upon a succession," thereby restricting "succession" to what, as defined in sec. 3, occurs on the death of a person domiciled here. And with that we have in the present case nothing to do. That being so, the present case comes precisely within what Lord Moulton in *Cotton v. Rex*, [1914] A.C. 176, 179, describes as the effect of *Rex v. Lovitt*, [1912] A.C. 212. "In the case of *Rex v. Lovitt*" (he says at p. 196) "no question arose as to the power of a Province to levy succession duty on property situate outside the Province. It related solely to the power of a Province to require as a condition for local probate on property within the Province that a succession duty should be paid thereon." This distinction between a tax upon a succession and other property seems to be carried out by the other provisions of the Ontario statute.

Both "dutiable value" and "beneficial interest" are used in sec. 4 — the one applicable to property, and the other to an interest under a "succession." Section 8 itself makes dutiable both "property passing on death" and "in respect to a succession." "Sections 11, subsec. 1, and 18 are confined to heirs, legatee, donee or other successor," while an executor is obliged to give a bond conditioned to account "for the succession duty for which the property of the deceased is chargeable." Section 18 deals likewise with the duty of an executor in regard to the same parties as are mentioned in sec. 11, subsec. 1. Anglin, J., in the *Smith* case, 58 Can. S.C.R. at p. 586, himself points out that "the features of the New Brunswick 'Succession Duty Act' which led Lord Robson in *Rex v. Lovitt*, [1912] A.C. 212, at p. 223, to treat it as imposing a tax rather in the nature of probate duty than a succession duty are entirely absent from the Nova Scotia statute." Having noticed this distinction, he proceeds in the *Smith* case to say: "By the law of England, therefore, which obtains in Nova Scotia, for the purpose of succession duties, as distinguished from probate duties and estate duties, personal property has its situs at the domicile of the decedent owner."

I may note in passing that those features which Lord Robson says "assimilate the tax to the probate duty" are:—

- (1) Tax laid on the corpus.
- (2) The executor is to give a bond for its payment.

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(3) The executor is to deduct the duty before handing over the property.

(4) The executor is to pay the duty where stock in a company in the Province is transferred by a foreign executor and the company permitting the transfer is held to be liable.

These features are covered in the Ontario Act in secs. 7, 8, 11, subsec. 3, and 10, except that in sec. 10 the company and not the executor is made liable.

From this it appears to me that *Rex v. Lovitt* and *Smith v. Provincial Treasurer of Nova Scotia* are not opposed to one another, except upon the constitutional question referred to above, but deal with two different and dissimilar statutes, and that we may well follow the example of the Judicial Committee in *Brasard v. Smith*, [1925] A.C. 371, in confining our decision to the question of actual situs and its effect. This narrows down the question to ascertaining and determining whether the shares involved in this case were actually situate in Ontario at the time of Bardol's death, and whether the tax imposed on them is not what the *Lovitt* case describes as a tax called succession duty, but payment of which is made a term of the grant of probate in Ontario.

A share represents an interest in the assets of the company which issues it, and it is that interest that, if the company carries on business in Ontario or has assets therein, is the taxable property. No doubt a share has other aspects or qualities, but for taxation purposes this is, or ought to be, the test. It gives point to those cases which decide that a share, debenture, warrant, etc., conspicuous and saleable in a particular country, has a situs there, and may be taxed there. Burton, J., as long ago as 1875, alludes to this quality in a share. He says in *Nickle v. Douglas*, 37 U.C. R. 51, at pp. 61 and 62:—

“Bank stocks or shares in an incorporated bank differ from both of these (visible chattels, debts, income, etc.); they may be themselves intangible, but they represent that which is tangible. They represent money or property invested in the capital stock of the bank, which capital is employed in business by the bank, and that business is generally carried on at a place other than the residence of the majority of the shareholders. The shareholder is protected in his person by the Government at the place where he resides, but his property in this stock is protected at the place where the bank carries on its business. . . .

“The country where the bank is situated has jurisdiction for the purpose of taxation through the property itself over all its shareholders, both resident and non-resident. Every shareholder



takes the property subject to the power of taxation of the Legislature of the country where the property is situate, and every non-resident by becoming an owner voluntarily submits himself to the jurisdiction of the Legislature of the place where the bank is established. The money so invested becomes subject to the taxing powers of the country where in contemplation of law it is invested."

The clearest exposition that I have found regarding the situs of what Lord Davey described as "but a bundle of rights" is to be found in the case of *New York Breweries Co. v. Attorney-General*, [1899] A.C. 62, 68 L.J. Q.B. 135. The shares were those of an English limited company, incorporated under the Companies Act, which had its registered office in the city of London. The share-register was kept in London only, and by the articles of association the only person to be recognised by the company as having any right in respect to a share was the registered holder. The company carried on a brewing business in the United States of America. Clausen, the registered owner of the shares in question, was domiciled in New York and died there, appointing by his will two executors residing in New York, who proved it in that State. The executors refused to take out probate in England. The company, after notifying the Revenue Department in England, transferred 2 shares to the foreign executors, and paid them the interest and dividends accrued on all the shares. The House of Lords, Halsbury, L.C., Lords Watson, Shand, Davey, and Ludlow, held that "an English company in transferring shares and debentures of a deceased foreigner to foreign executors who decline to take out probate or administration in this country, takes possession thereby, and administers the estate in this country of such foreigner, and becomes an executor *de son tort*, and as such chargeable with probate duty and the statutory penalties."

Lord Halsbury's reasoning is as follows:—

"Here is an incorporated company, and the deceased person is entitled to his aliquot share of the profits earned by that company. He dies, and according to the constitution of the company when a shareholder is dead the only person who is to be recognised as having a right to deal with his share is—I will put in the word which by implication is manifestly there — an English executor, or an English administrator. The company therefore, being now in possession of the share of the profits which belonged to the deceased person, are bound to see that they do not hand it over, or hand over anything that represents it, to any person who is not entitled to deal with it. That is their duty according to their constitution and according to law, because they are in possession

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of something which is available as assets of the testator's estate, *bona notabilia*, in this country. Then what do they do? They think proper to create a title in a person who had no authority to receive it on behalf of the dead person even according to the constitution of their own company . . . They have acted with full knowledge of the facts, and that full knowledge of the facts imported this: that they knew that by the entry in their register which they made they enabled property to be diverted from one person who, in this country, was by law entitled to it, to another person who had no such title at all. . . . We have had a long argument upon the subject, but it all comes to this: that because this particular form of property is conveyed in a particular way, so that under particular circumstances you have not what I may call a physical act of handing over the property, but you have merely a signature in a book, if you alter in the register the name of the person entitled to the goods, then, although that has the effect of creating a new title and giving the complete command over the property with which you are dealing, that (it is said) is not 'taking possession of or administering' within the meaning of the law. It appears to me, that so to treat it would be entirely to alter the ordinary use of language, and to suppose it to be fenced round with technicality, from which I think it is happily free. In my opinion there was here a 'taking possession' and there was an 'administering' within the meaning of the law, and therefore the persons who have done that are liable to these penalties and liable to the payment of this duty."

Lord Shand:—

"I think it would be very unfortunate if there was a different law applicable to shares in a joint-stock company or *choses in action* in this country. There is no real difference in principle. It is clear that without the act of the intervener, without the act of what I call the intromitter, in a case of that kind, whether as regards goods or company shares, the possession could not have been changed, and a fresh title in another party could not have been created."

In the Court below, *Attorney-General v. New York Breweries Co.*, [1898] 1 Q.B. 205, Rigby, L.J., said (p. 220):—

"By English law, with which alone we are concerned in this case, probate duty is payable in respect of all assets of a deceased person, whether domiciled or resident within this country or not, which are within the meaning of the numerous decisions on this point locally situated in England. The authorities shew that for this purpose the following are treated as local assets subject to pro-

bate duty. (a) Any choses in action which are incapable of being effectually transferred without some act being done in this country. This would include shares and debentures of a limited company incorporated in England, transfers or transmission of which must, as in the present case, be completed by entries made in this country in a register of members or a register of debenture-holders. (b) Any debts payable by debtors in this country, including incorporated companies which, as in the present case, are registered, managed, and controlled here."

To follow up the cases which deal with local situs, the following are instructive. As to *Attorney-General v. Higgins*, 2 H. & N. 339, Lord Dunedin in *Brassard v. Smith*, [1925] A.C. 371, 94 L.J.P.C. 81, says:—

"In the present case, Duff, J., dealing no doubt with the 'no local situation' argument, said as follows: 'And the Chief Baron's judgment' (in the *Higgins* case), 'I think, points to the essential element in determining situs in the case of intangible chattels for the purpose of probate jurisdiction as 'the circumstance that the subjects in question could be effectively dealt with within the jurisdiction.' This is, in their Lordships' opinion, the true test. Where could the shares be effectively dealt with? The answer in the case of these shares is in Nova Scotia only, and that answer solves the question."

I do not think that the fact that in *Attorney-General v. Higgins* the question had reference to the imposition of probate duty affects in any way the question of situs except in so far as it suggests that in regard to succession duty the doctrine of *mobilia sequuntur personam* may apply; but, as Lord Dunedin further points out, the word "transmission," under the Dominion Bank Act (1913, 3 & 4 Geo. V. ch. 9), "is used to express the legal result which follows on death, but not to express the actual step which is necessary to invest the new holder." That, he says, is done by transfer, and that transfer in such a case is effectuated by a change in the register where the shares are registered.

In *Baelz v. Public Trustee* (1926), 95 L.J. Ch. 400, Eve, J., following *Brassard v. Smith* (*supra*), says, speaking of income taxation on a shareholder, residing in Germany, in an English limited company, whose "residence" was said to be in Holland, as it was there that its whole business was conducted and where its directors resided and met:—

"There is nothing to support the view that a change of residence by the company will operate to transplant the interest of the individual as a shareholder to the locality of the new residence.

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1929. the enforcement of his rights, recourse must be had to the statu-  
— ERIE tory register which remains localised at the registered office and  
BEACH to the Court, with which alone under section 32 of the Com-  
Co. LTD. panies Consolidation Act, 1908, abides the power to rectify the  
v. register.”  
ATTORNEY- This view, with which I agree, disposes of the argument that  
GENERAL because the company could do business out of Ontario and could  
FOR consent through its directors to a transfer of shares, the shares  
ONTARIO. themselves were not “at home” in this Province.  
Hodgins, Eve, J., repeated in *In re Aschrott*, [1927] 1 Ch. 313, 320,  
J.A. in speaking of estate duty as to stocks, shares and certificates,  
owned by a testator who died domiciled in Germany (the shares  
were in English, South African, and American companies), his  
statement that “the evidence of title is the register, and accord-  
ing to the case of *Attorney-General v. Higgins*, 2 H. & N. 339,  
that determines the locality of the shares.”

But there is another ground upon which the shares in ques-  
tion would be liable to succession duty as locally situated in On-  
tario, even though his executors, or those to whom they are de-  
vised, become entitled to them by the will of Bardol, and that is  
that the provisions as to the transfer of shares above outlined  
makes the title to them one depending on Ontario law. As Mid-  
dleton, J., in *Re Fenwick* (1915), 35 O.L.R. 29, at p. 32, in deal-  
ing with an application to try the ownership of certain shares in  
the Canadian Ford Company, the legal title to which was in the  
Canadian administrator, said: “The shares of this Canadian com-  
pany have a local situs in Canada, and *primâ facie* the title to  
the shares ought to be determined by a Canadian Court.”

The will of the deceased may operate to make the executors  
or beneficiaries succeed or become entitled to the shares. Yet  
the transfer to or the perfecting of the title in them can only be  
made effective under the provisions of the Ontario Companies Act.  
These provisions include: (1) the requirement that effectually to  
transfer title to a share there must be an act done in Ontario.  
that is, by the record on the books of the company at the head  
office in Ontario of the transfer thereof and the surrender of the  
share-certificate; and (2) jurisdiction in the provincial Court to  
compel registration in the books of the company of the name of  
the owner of the shares. That governing rule on this branch of  
the case is laid down by Lord Cranworth, L.C., in *Wallace v.*  
*Attorney-General* (1865), L.R. 1 Ch. 1, 7, 9, where he said:—

“The question, therefore, is whether, where a person domiciled



abroad makes a will giving personal property in this country by way of legacy, the legatee is a person *becoming entitled* to that property within the true intent and meaning of the 2nd section. I think not. I think that in order to be brought within that section, he must be a person who becomes entitled by virtue of the laws of this country . . . . .

"The ground on which my opinion rests is that to the generality of the words in the second section under which a duty is imposed upon every person who becomes entitled to property on the death of another, some limitation must be implied, and that limitation can only be a limitation confining the operation of the words to persons who become entitled by virtue of the laws of this country."

The result of the application of this principle may be seen in *Attorney-General v. Jewish Colonization Association*, [1900] 2 Q. B. 556, where Ridley, J., at pp. 567, 568, 569, says:—

"But it follows from the decision of *Attorney-General v. Campbell* (1872), L.R. 5 H.L. 524, that if in order to administer property, or to carry out the trusts upon which it has been disposed, resort must be made to English law, succession duty is payable although the domicile of the testator be foreign, and it follows also from that and the previous decisions that, if the disposition of the property be made by a testator acting under a power given him by an instrument which must be construed and carried into effect by the laws of England, then also succession duty is payable, although the domicile of both predecessor and successor is a foreign one; but if the gift or devise be made by a person domiciled abroad, then, even though the property be situate in England, unless the intervention of the English law is required in order to carry the gift or devise into effect, succession duty is not payable. . . . .

"These later cases" (cited before Ridley, J.) "appear precisely to follow the rule which is properly deduced from *Attorney-General v. Campbell*, L.R. 5 H.L. 524, and that is, that upon devolutions of property such as are contemplated by the Succession Duty Act, sec. 2, the duty is payable although there be a foreign domicile, and although the property be foreign, if in order to administer the property or the trust to which it is subject recourse must be had to an English tribunal."

. On appeal, [1901] 1 Q.B. 123, this judgment was affirmed and *Wallace v. Attorney-General*, L.R. 1 Ch. 1, was followed. Stirling, L.J., in the Court of Appeal, said, at pp. 141, 142:—

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“The case of *Attorney-General v. Campbell* appears to me to shew that one contention put forward on behalf of the defendants is unfounded. This was based on the rule laid down by Lord Cranworth that the operation of the Act of 1853 is to be confined to persons who become entitled by the law of this country. It was sought to treat that rule as referring to the law of this country *exclusively*: so that, if the law of another country had to be considered for any purpose, as for example to ascertain the capacity of the settlor or the validity of his acts, it was to be taken as established that duty was not payable. If the rule laid down by Lord Cranworth is so understood, then it seems inconsistent with the decision in *Attorney-General v. Campbell*, for in that case the law of the testator’s domicile had to be regarded for the purpose of ascertaining his testamentary capacity and the validity of his bequest . . . . Lord Cranworth’s rule, therefore, if it is to be treated as now binding, must be taken to be satisfied, where property is found to be legally vested in a person subject to the jurisdiction of English Courts, and the title to the beneficial interest in that property is regulated and capable of being enforced by the laws of England, even although the operation of the instrument creating that title may to some extent be governed by foreign law.”

He also stated, at p. 138, referring to certain decided cases, that “foreign domicile has never since been regarded as the sole test applicable in every case of liability for (or?) exemption to succession duty.”

In *Blackwood v. The Queen* (1882), 8 App. Cas. 82, the head-note reads:—

“Although the law of a testator’s domicile governs the foreign personal assets of his estate for the purpose of succession and enjoyment, yet those assets are, for the purpose of legal representation, of collection and of administration, as distinguished from distribution among the successors, governed by the law of their own locality and not by that of the testator’s domicile.”

And Sir Arthur Hobhouse remarks at p. 97:—

“What their Lordships find is that the Victorian Legislature have imposed a tax payable by an executor, as a condition precedent to the issue and efficacy of the probate necessary for his action, out of the estate while it is in bulk, and before distribution or administration had commenced. All these things, the person to pay, the occasion for payment, the fund for payment, and the time for payment, point to the Victorian assets as the sole subject of the tax. The reasons which led English Courts

to confine probate duty to the property directly affected by the probate, notwithstanding the sweeping general words of the statutes which imposed it, apply in full force to this case."

In *Attorney-General v. Newman*, 1 O.L.R. 511, the test applied to deposit receipts, subject to notice before payment, was that no legal title did or could accrue to the foreign administrators by taking possession of the contracts found in the deceased's possession nor did his foreign letters of administration give him any such title, i.e., any title to demand and recover the money in Ontario.

An examination of the charter of the plaintiff company and our Companies Act bear out the applicability of these decisions to the case in hand. By sec. 56, subsec. 1, of the Ontario Companies Act, R.S.O. 1914, ch. 178, the shares of the plaintiff company were made transferable "in such manner and subject to such conditions and restrictions" as appeared in their letters patent or by-laws. By sec. 22 of the charter of this company, the directors had power to refuse to allow a transfer to be made. That section is in the following words:—

"22. Shares of stock in the company shall not be transferable without the consent and approval of a quorum of the board of directors. The shares of the company shall only be transferable by the recording on the stock book of the company at the head office of the company or at the office of the company's transfer agents, if any, by the shareholder or his or her attorney, of the transfer thereof and the surrender of the certificate of such share, if any certificate shall have been issued in respect thereof, and upon the making of such transfer in the books of the said company the transferee shall be entitled to all the privileges and subject to all the liabilities of the original shareholders, provided that the directors, in case any certificate of share shall have been lost, may in their discretion accept and cause to be recorded the said transfer without the production of the original certificate."

By secs. 60 and 61 no transfer of a share is valid until "entry thereof has been duly made" in the share-register—and that register is provided for in sec. 118. By sec. 119, it is enacted that this and other books are, under a penalty of \$200, to be kept "at the head office of the corporation in Ontario, whether the company is permitted to hold its meetings out of Ontario or not," though the Lieutenant-Governor in Council may, upon necessity therefor being shewn to the Provincial Secretary, relax this provision.

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It is moreover expressly provided by sec. 6 (*e*) of the Ontario Succession Duty Act that no duty shall be leviable on any bond, debenture or debenture stock issued by a corporation having its head office in Ontario "transferable on a register at any place out of Ontario" and which is owned by a person not domiciled at the time of his death in Ontario. This exception is a clear indication that shares, etc., not legally transferable out of Ontario are within the scope of the taxing Act.

As a matter of fact the head office of the plaintiff company remained in Ontario and so did the book of entry of shares. The company, after the death of Bardol, agreed to the transfer of two shares, and have also issued certificates therefor, as well as for the preferred and common shares owned by Bardol. These latter certificates were issued on the 11th August, 1926, to Bardol's executors in Buffalo and sent to them. They certify that the Bardol executors are the owners of the shares in the plaintiff company (9,000 preference and 96 common) "transferable only on the books of the corporation by the holder thereof either in person or by attorney, upon surrender of this certificate properly endorsed."

The conclusion I have come to on the whole case is that these shares had a situs in Ontario, and that they were properly taxable therein. Whatever interest in them was taken by the executors or beneficiaries of Bardol under his will was, it seems to me, ineffective under our Companies Act, until the shares were recorded in the names of the executors with the consent of the company; and it cannot be said that the executors of Bardol became entitled under the will alone; they needed the assent of certain persons, namely, the directors of the company, and also the entry of their own names on the register at the head office, to enable them to acquire the legal title to the shares. Even assuming that the directors who were authorised to sanction the sale or transfer of the shares resided and acted in the State of New York, the provisions of the Ontario statute require that the shares shall only be transferable by the "record on the stock book of the company at the head office of the company of the transfer thereof, and the surrender of the share-certificate if one has been issued," in which case only is the transferee entitled to all the privileges of the original shareholder, and subject to all his liabilities. In plain English, the situation seems to resolve itself into this, that, while the interest of Bardol in the shares could be transmitted or devolved by the terms of his will, the shares themselves could not effectually vest in any devisee of his or trans-



free from his executors so as to constitute them shareholders until the act took place in the Province of Ontario, which, by virtue of Ontario law, gave the beneficiary the benefit of the title to the shares.

The case of *Attorney-General for Ontario v. Baby* (1926), 59 O.L.R. 181, 60 O.L.R. 1, was relied upon by the respondents as indicating that, notwithstanding the physical position of these shares, their situs in contemplation of law was in the State of New York. I do not regard that case as any authority for that proposition, and if my reference therein to "the present legislation" is interpreted to include the whole of the Act, I think it went too far. It is obvious that what was being dealt with there was merely "succession" as defined by sec. 3, and the effect of the case is to my mind that such a succession, being merely the accrual of a title or right in the person benefited, did not include the perfecting of his title by an instrument or by the intervention of a court or other authority.

The situation then, as I see it, is that the shares have a local situs in this Province, and that the rule laid down in *Blackwood v. The Queen*, 8 App. Cas. at p. 93, by Sir Arthur Hobhouse, in delivering the judgment of their Lordships' Board, correctly sets out their position. He says: "For the purpose of succession and enjoyment, the law of the domicile governs the foreign personal assets. For the purpose of legal representation, of collection, and of administration, as distinguished from distribution among the successors, they are governed not by the law of the owner's domicile, but by the law of their own locality."

This, I think, shews the extent to which the doctrine *mobilia sequuntur personam* affects personal property having a local physical situs. After collection, the payment of debts, and administration, the residue is handed over to the foreign representative to be there distributed in accordance with the law of the domicile. But I do not understand it to prevent taxation by the authority which protects and administers it if found in the Province, but rather the contrary.

The shares come directly within the definition in sec. 7, clauses (f) and (g), and so are liable to taxation under sec. 3. But in this action the plaintiff company desire a declaration that they themselves are not so liable and contend that sec. 10 is *ultra vires* as introducing in effect indirect taxation. Whatever may be said on the construction of that section, which imposes on a company, which has no interest in the subject-matter taxed, what is in

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effect a heavy penalty, I am satisfied that there is no indirect taxation imposed by it.

The accepted definition of indirect taxes is that they are "demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."

Whether judged by the definition accepted as the full test down to the recent case of *Attorney-General for British Columbia v. Canadian Pacific Railway Co.*, [1927] A.C. 934, or as stated in that case, I have come to the conclusion that the section is *intra vires*. It is in effect a prohibition against a corporation, having its head office in Ontario, allowing a transfer of stock or shares made by a foreign executor and therefore of property situate in Ontario, before the duty is paid, and also prohibiting any corporation in Ontario from allowing the transfer of any property in Ontario until the duty is paid.

In each of such cases the allowance of the transfer of the property is a distinct breach of a statutory prohibition binding upon the corporations named, and certainly binding upon the plaintiff company. It cannot, therefore, it seems to me, reasonably be contended that the Legislature in enacting this section had the expectation, much less the intention, that the offending corporation should indemnify itself against its own wrong-doing. Indeed the section contemplates the parting with the property itself by the prohibited act in all cases, and it would seem completely to negative any suggestion that, after allowing the property to be transferred away, indemnity was intended to be sought, possibly in a foreign country, for the doing in this Province of the prohibited act, and that against a co-operator in the wrong. It would in effect be first to hand over the property and then sue the recipient to return it.

In the case of *Attorney-General of British Columbia v. Canadian Pacific Railway Co.*, [1927] A.C. 934, Lord Haldane has dealt with the definition given by John Stuart Mill, which, he says (p. 938), is "taken as a fair basis for testing the character of the tax in question, not as a legal definition, but as embodying with sufficient accuracy an understanding of the most obvious indicia of direct and indirect taxation, such as might be presumed to have been in the minds of those who passed the Act of 1867."

In the case of *Rex v. Caledonian Collieries Ltd.*, [1928] A.C. 358, Lord Warrington of Clyffe says, in speaking of the question whether a tax is direct or indirect (p. 362):—

"Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct

tax that it affects persons other than the first payers; and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The Legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies."

For these various reasons, I think the appeal should be allowed and a declaration should be made that the shares in question are subject to taxation under the Succession Duty Act, and that sec. 10 is *intra vires* the Ontario Legislature.

The respondent company must pay the costs of the appeal.

*Appeal allowed.*

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[APPELLATE DIVISION.]

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*Landlord and Tenant—Lease of Building—Sublease of Part with Option of Renewal upon Notice—Release—Surrender—Service of Notice upon General Agent of Landlords Resident Abroad—Sufficiency—Extension of Term—Failure of Action of Ejectment.*

The plaintiff, the owner of a building of which the defendants, as sublessees, occupied a part, sought by this action to eject them. The defendants claimed the right to remain, having accepted, as they alleged, an option for a continuance of their tenancy, provided for in their sublease. Before the plaintiff became the owner of the building, R. & Co., the lessees of the whole building, whose subtenants the defendants were, executed in favour of their landlords, the then owners of the building, a document, dated the 17th September, 1927, which recited their lease and default in payment of rent and taxes, and witnessed that they (called in the document the "releasers") abandoned all their rights, privileges, and benefits under the lease and released and quitted claim unto the landlords (called the "releasees") all their right, title, and claim under the lease; upon the understanding and agreement that the releasees did not by or under the document, or by any subsequent acts in taking possession of or dealing with the premises, assume any responsibility to the releasers or any one claiming under them in respect of the lease:—

*Held*, that this document was a surrender and not merely evidence of a forfeiture.

A clause in the defendants' sublease, which was for two years, gave them an option for a further period of three years at a named

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rental—"three months' notice in writing to be given in the event of this option being exercised." In the head lease to R. & Co. it was provided that the lessors should appoint and keep some person residing in the city of T., where the building was, "as their agent, to whom the lessees may pay their rent and give all notices and who will be authorised to receive applications for and grant all legal consents, waivers, and other concessions to the lessees." On the 30th November, 1927, the defendants addressed to the owners, who resided in the United States, and to B., of the city of T., "their agent," a notice of their (the defendants') election to continue as tenants for the further period of three years. The notice was not served upon the owners, but upon B.:—

*Held*, that the notice was properly given to the original landlords, to whom R. & Co. had previously released their interest; and

*Seemle*, applying the rule as to conditions laid down in Sheppard's Touchstone, ch. 6, p. 136, that the defendants were not bound to go to the United States and serve the landlords, wherever they were to be found; and the condition under which a further term could be obtained had not been broken, owing to the absence from Canada of the landlords.

And, having regard to the evidence, and considering what B. did and what he and his principals wrote, he was not merely an agent acting under special instructions, but was the general agent of the landlords in respect of the premises in question, and the notice was properly served upon him.

Review of the authorities.

The defendants were, therefore, entitled to a further term of three years, pursuant to the proviso in their lease, and on the other terms of their lease; and the action failed.

The following statement is taken from the judgment of HODGINS, J.A.:—

Appeal by the defendants from the judgment of RANEY, J., whereby he directed judgment to be entered for the plaintiff for possession of the premises (the ground floor and basement of 226 Bay-street, Toronto), and for use and occupation at \$300 a month from the 28th February, 1928, until delivery up of possession.

The facts of the case are simple, but the points involved are not free from difficulty.

The plaintiff is the owner of the building known as 226 Bay-street, of which the defendants occupy a part, and in this action he seeks to eject them. The defendants claim to remain, having accepted, as they allege, the option given by their sublease.

The title of the parties needs to be stated. On the 16th January, 1926, the then owners, Mabel Carleton, of New York city, and Joseph L. Stanton, of Los Angeles, California, leased the building to Fred H. Ross & Company Ltd. and Malcolm E. Ross, both of the city of Toronto, for five years from the 1st March, 1926, ending on the 28th February, 1931. On the 3rd October, 1927, negotiations began with the plaintiff, resulting



in an agreement bearing date on that day, whereby the plaintiff agreed to buy the entire building. Pursuant thereto a deed was given to the plaintiff dated the 9th November, 1927, and registered on the 30th November, 1927. Prior to this sale, Fred H. Ross & Company Ltd. and Malcolm E. Ross executed a document dated on the 17th September, 1927, in favour of their landlords, which recited the lease of the 16th January, 1926, and default in payment of rent and taxes. This agreement continues:—

“Now therefore this indenture witnesseth that the said releasors hereby abandon all their rights, privileges, and benefits under the said in part above recited lease unto the said releasees, and release and quit claim unto the said releasees all and every interest, right, title, and claim of the said releasors, of, in, to, and under the said lease.

“And it is hereby understood and agreed by and between the parties hereto that the releasees do not hereby or hereunder, or by any subsequent acts in taking possession of the said premises, or in dealing with the said premises, in any way assume any responsibility to the said releasors or any one claiming through or under the said releasors in respect of the above in part recited lease respecting the premises 226 Bay-street, Toronto.”

The difficulties in the case arise out of this document and also out of the option contained in the sublease granted by Fred H. Ross & Company Ltd. to the defendants in February, 1926, for two years from the 1st March, 1926, and ending on the 28th February, 1928. This sublease, after stating the term, continues:—

“With an option for a further period of three years at three thousand dollars a year; three months’ notice in writing to be given in the event of this option being exercised.”

In that sublease the following clause occurs:—

“Provided and it is hereby agreed between the parties hereto that, where the context makes it possible, the word ‘lessors,’ wherever it occurs in this indenture, shall include the heirs, executors, administrators, successors, and assigns of the said lessors, and the word ‘lessees’ shall include the heirs, executors and administrators of the said lessees (and in case of a corporation their successors and assigns) and also shall, when the lessees assign these presents under consent from the lessors, as heretofore provided, include the assignees of said lessees.”

In the head lease to Ross, the following provision appears:—

“Provided that the lessors will appoint and keep some person or body corporate resident in Toronto from time to time, as their agent, to whom the lessees may pay their rent and give all notices

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and who will be authorised to receive applications for and grant all legal consents, waivers, and other concessions to the lessees."

The provision just quoted as to the meaning of "lessor" and "lessee" is found in the head lease.

On the 30th November, 1927, the defendants gave the following notice, addressed "To Mabel Carleton, of the city of New York, in the State of New York, married woman, and Joseph L. Stanton, of the city of Los Angeles, in the State of California, Esquire," and to "James Harvey Bone, of the city of Toronto, their agent:"—

"Take notice that we, the undersigned, A. Chamandy & Sons, of the city of Toronto, in the county of York, lessees of the ground floor and basement of the building erected and known as number 226 Bay-street in the city of Toronto, under lease dated the .... day of February, 1926, made between Fred H. Ross & Company Limited, of the city of Toronto, in the county of York, lessors therein named, of the first part, and A. Chamandy & Sons, of the same place, lessees therein named, of the second part, do hereby exercise our right or option to extend the term of the said lease for the further period of three (3) years, and we elect to continue as tenants of the said premises for the said further period of three (3) years as provided by the said lease, upon the terms and conditions in the said lease set out.

"Dated at the city of Toronto this 30th day of November, 1927. A. Chamandy & Sons, per A. Chamandy."

This notice was not served on the head landlords personally, but upon Mr. J. Harvey Bone, to whom it was delivered on its date at about 12.30 p.m.

From the evidence it appears that after Bone received this notice he went to the registry office with the plaintiff to close the sale, and that before he so went he told or notified the plaintiff of the receipt of the defendants' notice to extend the term of their lease. The purchase by Gray was however closed either immediately after this visit to the registry office on that day, or, as stated by Mr. Gray, on the 1st December, the day following. The closing appears to have been carried out on the terms of a clause in the agreement for sale, which is as follows:—

"Notwithstanding anything herein contained, should the vendors be unable to deliver possession of said premises on date of closing, the purchaser may at his option waive necessity of securing possession, and assume any tenancies outstanding then; but, should the purchaser insist upon possession of said premises on date of closing, the vendors may cancel this agreement upon re-

turn of deposit without interest, and the vendors shall not be liable in any way to the purchaser for failure to deliver possession as aforesaid."

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On the 3rd March, 1928, Mr. Gray, having become the owner of the premises, served a document on the defendants requiring them forthwith to go out of possession and to deliver to him possession of the lands which he owned, being the premises in question herein. But it appears that on or about the 30th September, 1927, and just before the agreement to sell to the plaintiff was made, Mr. J. H. Bone, acting for the original owners Carleton and Stanton, took action under the overholding tenants sections of the Landlord and Tenant Act, before his Honour Judge Denton, and made an affidavit therein dated the 4th October, 1927, as the duly authorised agent in Toronto of Mabel Carleton and Joseph L. Stanton, with respect to the premises 226 Baystreet. This affidavit was used in the proceedings, as well as the document of the 17th September, 1927. The application before the County Court Judge was dismissed without costs on the 15th October, 1927 (*Carleton v. Ross*, 33 O.W.N. 88), he having decided that the document of the 17th September, 1927, was in substance a surrender. On appeal to a Divisional Court the order was discharged, the Court being of opinion (33 O.W.N. 163) that the right to possession could not be determined in a proceeding before the County Court Judge; hence this action.

October 25, 1928. The defendants' appeal from the judgment of RANEY, J., was heard by MULOCK, C.J.O., MAGEE, HODGINS, and GRANT, J.J.A.

*I. F. Hellmuth*, K.C., and *H. H. Davis*, K.C., for the appellants. The trial Judge erred in finding that the defendants were not entitled to serve the notice of the 30th November, 1927, on Mr. Bone, who was the solicitor and general agent of the former owners of the premises and also the solicitor on the record of the plaintiff herein. The fact that the head lease contained the provision that the owners should keep an agent in Toronto to give and receive notices, legal consents, applications for leases, and to collect rents, etc., and that Mr. Bone did so act, managing the building, collecting rents, etc., and that in the proceedings brought by the original owners under the Landlord and Tenant Act he filed an affidavit in which he described himself as the duly authorised agent of the owners in respect to the premises, precludes the plaintiff from setting up that this ostensible general authority was limited and that Mr. Bone was not authorised to

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receive the notice in question: *Bowstead on Agency*, 7th ed., pp. 3 and 80; *Provincial Insurance Co. of Canada v. Leduc* (1874), L.R. 6 P.C. 224.

*D. L. McCarthy*, K.C., and *S. A. Hayden*, for the plaintiff, respondent. Bone was not the agent of the owners for the purpose of receiving the notice exercising the option for an extension of the lease. The release signed by Ross dated the 17th September, 1927, was prepared by Bone and held simply for his own protection against Ross. It was not signed by the owners, nor were they aware of its existence. Therefore they cannot be bound by it. There was an abandonment in fact. But, apart from this document, the facts that the head lessee had no money, that he was in arrears as to both rent and taxes and could not be found, and that a written demand for possession was made by Bone on the subtenants and tenants, create a forfeiture in law. Even if there was only a surrender and not a forfeiture, the notice given to Bone was not addressed or delivered to the proper person, in the circumstances. Bone's position was that of a solicitor only for the owners and not an agent. The affidavit referred to was made on the specific instructions of the owners. In any event his agency was limited to specific instructions contained in the letter from the owners dated the 16th September, 1927. Reference to *Bowstead on Agency*, 7th ed., p. 80; *Dominion Coal Co. Ltd. v. Kingswell S.S. Co. Ltd.* (1900), 33 N.S.R. 499; *Saffron Walden Second Benefit Building Society v. Rayner* (1880), 14 Ch. D. 406, at p. 410; C.E.D. (Ont.), vol. 1, p. 126.

*Hellmuth*, K.C., in reply. The demand on the 30th September cannot create a forfeiture when on the 17th September the head lessee had been eliminated and a surrender had been accepted. The owners cannot now repudiate the surrender, having accepted it and relied upon it in the overholding tenant proceedings in the County Court: *Carleton v. Ross*, 33 O.W.N. 88, 163.

January 14, 1929. The judgment of the Court was read by HODGINS, J.A. (after setting out the facts as above):—The questions to be determined on the state of facts I have related are, whether the document of the 17th September, 1927, was a surrender to the then owners by the Rosses or whether a forfeiture had occurred and was being enforced; and, secondly, whether the notice given on the 30th November, 1927, was a good and sufficient notice entitling the defendants to three years' further possession after the expiration of their lease on the 28th February, 1928.



As to the first question, the learned trial Judge says in his reasons for judgment that the question of surrender or forfeiture was not raised in the statement of claim, and therefore he does not deal with it, but that, if he had to, he would have seen no reason to differ from the conclusion reached by his Honour Judge Denton. I think the question is one which has to be decided, and it was argued fully before us, for on its solution depends the continuance or the reverse of the lease to the defendants.

At the time the document was taken, the defendants were lessees of part of the premises under the Rosses. Their sublease was assented to by J. H. Bone, pursuant to the provision in the lease whereby the head lessors were obliged to appoint some one resident in Toronto as their agent, who was to be authorised to grant all legal consents, waivers, and other concessions to the lessees. Under those circumstances, the document in question signed by the Rosses alone would not be a release of the whole estate in the premises or evidence of a forfeiture of the whole, and I think its language is such as to indicate that it was the interest of the Rosses which alone was being dealt with or got in. The parties are described as releasors and releasees, and in the recital it is treated as a release of the Ross interest alone, which construction the words of the operative part fully carry out. In it is the clause, already quoted, to the effect that the releasees do not, by the document or any subsequent act in taking possession or in dealing with the premises, assume any responsibility to the releasors or "any one claiming through or under the releasors in respect of the above in part recited lease respecting the premises 226 Bay-street, Toronto." This evidently refers to the outstanding lease to the defendants. My conclusion is the same as that of Judge Denton and of the trial Judge here, that this document must be considered a surrender and not as merely evidence of a forfeiture. The words used in it "release and quit claim" are appropriate to the surrender of a term of years when the grantee has the reversion: *Nicholson v. Dillabough* (1862), 21 U.C.R. 591, 594; *Cameron v. Gunn* (1865), 25 U.C.R. 77; *Acre v. Livingstone* (1867), 26 U.C.R. 282. The reason for taking it and the use made of it both indicate that it was intended so to operate.

It may be noted in passing, in connection with the statement made in the affidavit of Mr. Bone that he was the duly authorised agent of the then owners, that his subsequent denial on the 30th November, in the letter to Kilmer Irving and Davis, "I deny all allegation or suggestion that I am the agent of Mabel Carleton

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or Joseph L. Stanton," was made for a purpose and was not in my judgment a true statement.

The second question is one of more difficulty. The clause in the defendants' lease stipulates for three months' notice in writing to be given in the event of the option being exercised. It does not say to whom or how or where the notice is to be given. *Primâ facie* the notice in writing should be given to the lessors, who were Ross & Co. But, as they had previously released their interest in the premises to their landlords Carleton and Stanton, and the provision in the defendants' lease already quoted with regard to the meaning of the words "lessors" and "lessees" being applicable, it was, after that release, properly given to the original landlords, who had become assignees of all interest held by the Rosses.

The question then arises whether, if notice was to be given to the original landlords, who were then living in the United States, the defendants were bound to go to them and serve them wherever they were to be found.

In Sheppard's Touchstone, ch. 6, p. 136, in dealing with conditions, it is laid down that, where a place is set down for the doing of the thing contained in the condition, then it must always be done at that place, unless by some agreement made between the parties afterwards another place be appointed: otherwise the condition is not performed, and the parties are not bound to attend in any other place. But in cases where there is no place set down for the doing of the thing contained in the condition, if the thing to be done be a corporal service, as to pay money, or any such like thing, the party that is to do it must at his peril seek out the person to whom it is to be done, if he be *infra regnum Angliæ*; but if he be not within the kingdom, he is not bound to seek him, and yet the condition is not broken.

This is recognised as being the law in the case of *Haldane v. Johnson* (1853), 8 Ex. 689, where it is stated, in dealing with a covenant to pay money to the lessor on a particular day, no place being mentioned for payment, that when an obligation is to pay a sum of money, or to do any like transitory thing to the obligee on a day certain, but no place is set down where it shall be done, it must be done to the person of the obligee wheresoever he be, if he be *intra quatuor maria*. In that case the covenant was to pay a sum of money to a lessor, no particular place being mentioned "either expressly or by implication," as the Court remarked. See also *Thorn v. City Rice Mills* (1889), 40 Ch. D. 357,

and *Fowler v. Midland Electric Corporation for Power Distribution Ltd.*, [1917] 1 Ch. 656.

There may be some doubt whether or not, in case of an option such as here, the same rule would be applied. Very strict construction of the terms of a conditional option is the rule, as, for instance, in the case of *Stait v. Fenner*, [1912] 2 Ch. 504, where the lease contained a provision that the lessee might terminate the lease at the end of the first seven or fourteen years on giving six months' previous notice in writing, and that, if the lessee should give the notice and pay all the rents and perform all the covenants up to such determination, then the lease should cease and be void. The condition as to the payment of rent and that as to the performance of covenants were held to be conditions precedent, and that, unless they were performed after notice was given, up to the time of the determination mentioned in the notice, the term did not cease and the lease was not void.

In *Burch v. Farrows Bank Ltd.*, [1917] 1 Ch. 606, the same learned Judge (Neville, J.) held the parties strictly to the observance of the terms by which they were given the privilege of putting an end to the term, one of which was observance of all the covenants. The premises being out of repair, the tenant commenced repairs shortly before giving the notice and completed them a few days after the date for the determination of the lease. It was there held that, the condition not having been fulfilled before the time fixed for determination, the notice was bad, and the lease was not determined.

Both of these cases followed *Grey v. Friar* (1854), 4 H.L.C. 565.

In *Re Western Trust Co. and Feinstein* (1922), 67 D.L.R. 324, Bigelow, J., held that a provision that, should the lessor sell the premises and the purchaser require possession of the same, the lessee should vacate upon receiving 30 days' notice in writing, was not complied with by a notice of the sale which did not state that the purchaser required possession of the premises.

In *Cadby v. Martinez* (1840), 11 A. & E. 720, the proviso in the lease was that if the tenant should be desirous of determining the tenancy at the end of the first seven or fourteen years, and should leave or give six calendar months' notice immediately preceding the expiration of the first seven or fourteen years, the demise should determine. The judgment of the Court, presided over by Lord Denman, C.J., was that in no case has the proviso or covenant in a deed been held to be satisfied by a notice inconsistent with the terms of it, and that the notice was given for a

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wrong day, although the jury had found that the landlord had understood the notice as referring to the last day.

There does not seem to be any difference in principle between a condition requiring the payment of money, and one necessitating the handing over of a written notice. And the limitation that the person in relation to whom each act must be done should be within the realm, or within Canada, is reasonable. Otherwise a landlord could easily defeat a condition by going on a foreign journey, or stepping across the line.

While, therefore, I see no reason why the rule laid down in Sheppard's Touchstone should not apply in this case, so that it should be held that the condition under which a further term could be obtained has not been broken, owing to the absence from Canada of both of the landlords, yet, in view of the practical and legal consequences of such a technical holding, I prefer to rest my judgment upon a different and more substantial ground, namely, that the notice was properly given to Bone as the general agent of the landlords, in respect to the premises in question.

Counsel for the plaintiff argued that Bone was merely an agent acting under special instructions, but I think, when consideration is given to what he did and what he and his clients wrote, the reverse will be found to be the case.

On the 14th September, 1927, Bone wrote to Stanton, one of the head landlords, in answer to a letter which has not been produced, as follows:—

"Ross has practically thrown up his hands, and I am endeavouring to have the tenant on the ground floor take over the lease, pay up the arrears; as Ross has fallen in arrears we have the right to make the subtenant pay the arrears or vacate. I do not wish to see the building go vacant; consequently I have a problem on my hands how best to handle the matter, and not lose any revenue.

"The sale to Allcock & Company fell through, chiefly because we could not give them possession of the ground floor. The ground floor is under a lease to Chamandy, and he has a written lease from Ross. This is the man who may take over Ross's lease and pay all arrears. I was to have had something definite last Monday along this line. I can take over from Ross any time *and continue to manage the building*. As far as Ross is concerned, he is through with me, but *I do not want to go into possession* without first making some attempt to have some tenant pay the arrears.



"It is difficult to handle the situation when your clients are not close enough to discuss the matter with and receive instructions from. It looks now as though *the only alternative is for us to manage the building for you, as we did in the olden days*, or lease the building to somebody. By own suggestion is to take advantage of present situation by making new leases direct between yourselves and the tenants, and each lease to have a sale clause in it to the effect that should a *bonâ fide* sale of the building take place, the tenant will vacate upon receiving 90 days' notice. I believe I can rent the building now with such a clause to the present tenants at the same rental Ross was securing, which would pay you as much as you receive from Ross and *our commission for handling and looking after the matter*, and possibly a slight profit in the future. On the other hand, *we would have to forgo now the amount Ross owes us*. We could take judgment against Ross for that amount, and it would be good for 12 years, but I do not think Ross has a cent left. He has lost all his father's business, in my opinion, and has lost the estate given to him by his late mother, and I do not think he has a cent left.

"Please, therefore, instruct me with definite instructions how to proceed, or else give me wide open instructions without responsibility for loss to handle the matter as I suggested. If we can get leases now with a sale clause in, I would not consider that your \$2,000 was money lost, but rather we'll spent to get such a clause."

On the 15th September, and before an answer to that letter was received, Bone wrote to the defendants informing them of Ross's default, advising them not to pay any further rent other than to himself, or the owners of the building, and adding:—

"I expect in a course of a day or so to be in a position to discuss leases and rents with you. We understand that Mr. Ross collected the rents for the current month of September, but has never paid any of it to the landlords.

"It is not the intention of the landlords to embarrass or seriously inconvenience any sublessees."

On the 16th September, Mr. Carleton, husband of one of the owners, visited Toronto and after leaving wrote to his wife's co-owner, on the 16th September, a letter in which he advised his co-owner that he had just returned from Toronto and that he had advised Mr. Bone as follows:—

"1st, to take immediate steps to legally eliminate Mr. Ross and make an attachment for arrears if he has anything.

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"2nd, to notify the present tenants that we would allow them to continue at Ross's figures but subject to a 90-day sale clause.

"3rd, to buy coal immediately.

"4th, to re-engage the present engineer, who acts as elevator man for the building.

"5th, to have all rents made payable to Mr. Bone for us as owners.

"6th, to use all the income to pay off charges against the property.

"7th, to have the title cleared."

The seventh item above mentioned refers to certain restrictions on the property, while all of them seem to cover suggestions from Bone in his correspondence. The letter expresses the hope that the writer's co-owner will endorse what he has done and insist upon them being carried out.

On the 17th September, Bone, without waiting for anything further, accepted Ross's surrender already referred to, and on the 20th September, Mr. Stanton, one of the owners, replied to Mr. Bone as follows:—

"Dear Mr. Bone: Replying to yours of the 14th, I have carefully read your account of conditions pertaining to the Bay-street lease and am agreed that there appear to be but two ways of adjusting affairs, namely, *to either take over the lease and handle rentals, etc., through your office or arrange with tenant to handle. The first plan would in my opinion be preferable unless the tenant can give satisfactory evidence of his stability and ability to carry on.*

"I am in accord with Mrs. Carleton, who has expressed the view that the present tenants be allowed to continue at Ross's figures but subject to a 90-day sale clause.

"Action should be taken against Mr. Ross to recover the arrears if possible. *Other details concerning the management of building, including employment of engineer and purchasing fuel, etc., should be left to your discretion.*

"Income from rents should apply on our present indebtedness until finally cleaned up, providing that payments on delinquent taxes can be made in such manner.

"In regard to the present situation, I quite agree that something must be done to place us on a more substantial basis, and to that end I am anxious to co-operate in every way possible. According to my knowledge of the property, it should at least be self-supporting, and if the plans proposed by Mr. Carleton

are accomplished, I believe everything will work out to our mutual satisfaction.

“My correspondence with Dr. Carleton indicates that title to property is clouded through restraints which have never been removed. This feature I am entirely ignorant of, but am of the opinion that immediate steps should be taken to absolutely clear the title for prospective purchasers. A defective title might prove embarrassing in event a sale were possible.

“Please let me hear from you as to action taken and do not hesitate to consult me upon any future development brought about by your good self and Dr. Carleton.”

Following that letter, which assents to the proposition made by Bone that he should take immediate steps to eliminate Ross and continue to manage the building, I think the reasonable conclusion is expressed in Bone's affidavit of the 4th October, 1927, when he swore that he was the duly authorised agent of the landlords of the building in question. He at once proceeded to do the following things:—

On the 21st September he writes to the defendant's solicitors: “I am now in a position to talk a new lease to your clients and without prejudice make an offer of terms.”

On the 28th September he writes: “The offers of rental made to you verbally or by letter recently by me are hereby withdrawn;” and demands payment of the arrears owing by Ross, or possession.

On the 30th September he serves a formal demand for possession on the defendants, signing the same “Mabel Carleton and Joseph H. Stanton, per J. H. Bone, attorney and solicitor.”

On the 3rd October he negotiates with the plaintiff and concludes an important and complicated agreement to sell the property to him for \$75,000, and receives from the plaintiff 10 bonds of \$1,000 each of the Canadian Cannery General Mortgage 6's, 1950, and held them until he returned them to the plaintiff on the closing of the transaction.

On the 4th October he makes an affidavit to be used in the overholding tenant proceedings to which I have referred.

On the 18th October he receives a cheque for \$208.34 sent by the defendants, being the amount of the October rent of the defendants' premises, and on the 19th he acknowledges receipt of that amount, stating “this is received absolutely without prejudice, we to account later.”

On the 2nd November another cheque was sent by the defendants for the month of November, which is acknowledged on the following day by Bone, stating that the same was accepted

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on the same basis as the last one, namely, "that it was paid without prejudice and received without prejudice pending the litigation between the landlord and yourself." This refers to the overholding tenant proceedings, and the appeal therefrom then pending.

Judgment having been given by the County Court Judge on the 15th October, Bone serves a notice of appeal on behalf of the owners on the 28th October, judgment thereon being given on the 2nd December.

On the 30th November, and before the closing of the transaction with the plaintiff, he received notice from the defendants, at about 12.30 p.m., exercising their option. Subsequent thereto he went to the registry office to close the transaction with the plaintiff, then informed the plaintiff of the receipt of the notice, and after that the deed was registered by the plaintiff in the afternoon of the same day.

On that or the following day, according to his evidence, the deal was closed apparently by the handing over by the plaintiff of certain bonds mentioned in the agreement for sale and payment of the balance of the adjustments.

This deed is dated on the 9th November, and is signed by the landlords themselves, at Los Angeles and New York, respectively, on the 15th November and the 26th November, 1927.

I confess I am unable to see, in view of the letters passing between the owners and Bone, which I have quoted, and the activities of Bone pursuant thereto, what more an agent employed to manage the property could have done. Added to this is the fact that in the Ross lease such an appointment was contemplated, an agreement of which the defendants cannot take advantage, but which makes the probability of such an appointment much more natural. The conclusion, which I think inevitable, is that Bone did in fact occupy the position of general agent or manager for the foreign owners in fact, and was, before and on the 30th November, 1927, as such, an agent duly authorised to receive the notice exercising the option, and that the defendants were justified in serving him for the landlords and that such service was due notice of the exercise of the option. To hold otherwise would be to disregard all that the owners and Bone have written and done, and what Bone himself affirmed on oath.

In *Jones v. Phipps* (1868), L.R. 3 Q.B. 567, Sir Maxwell Graves was beneficially interested in a farm, the legal title to which was in trustees, who left to him the entire management and the control of the farm, for many years. Lush, J., in giving



the judgment of the Court, speaks of him as having assumed the entire control of the farm, and having been allowed by the trustees for a period of 26 years to have the entire management of it, and proceeds (p. 572):—

“We therefore infer that it was with the sanction of the trustees that he (who had himself furnished a portion of the purchase-money of the farm) dealt with it as his own, and negotiated with the defendant as to the terms and continuance of the holding. It was incidental to such an authority that he should determine the tenancy by notice to quit at such time as he should think proper;” and speaks of him as being a general agent as distinguished from one holding a special or limited authority.

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Bowstead on Agency, 7th ed., p. 80, gives the following illustration:—

“A. is the manager of an estate. He has implied authority to contract for the usual and customary leases, and to give and receive notices to quit to and from the tenants; and to enter into agreements with tenants authorising them to change the mode of cultivation, and providing for the basis on which compensation for improvements shall be payable on the determination of the tenancy.”

In *In ré Knight and Hubbard's Underlease*, [1923] 1 Ch. 130, Sargant, L. J. (then Sargant, J.), speaks of a somewhat similar situation thus (p. 142):—

“In view of the position of the trustees and of this course of conduct, it is absolutely clear that the trustees, as the legal owners of the property, allowed the society, as the absolute beneficial owners, to have the full management of it, and to deal directly with the plaintiff, and no doubt with the other occupying tenants; and that any notice to terminate given by the society, or by Messrs. Tyler & Co. as their agents, was one given with the full authority of the trustees so far as was necessary. The present case seems to me a much stronger one in this respect than that of *Jones v. Phipps*, *supra*, or that of *Browne v. Peto* (1898), 16 Times L.R. 131.”

To the same effect are *Roe ex d. Dean and Chapter of Rochester v. Pierce* (1809), 2 Camp. 96, and *Provincial Insurance Co. of Canada v. Leduc*, L.R. 6 P.C. 224.

I would therefore reverse the judgment at the trial and substitute for it a declaration that the defendants are entitled to a further term of three years at \$3,000 per year, pursuant to the proviso in their lease, and on the other terms of their lease, and directing the plaintiff to pay the costs of the action and appeal.

*Appeal allowed.*

## [APPELLATE DIVISION.]

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PENNY V. HUNT.

Jan. 14.

*Husband and Wife—Liability of Husband for Debts of Wife Contracted before Marriage—Married Women's Property Act, R.S.O. 1914, ch. 149, sec. 18—Effect of Repeal by R.S.O. 1927, ch. 182—Whether Common Law Liability Revived—Money Given by Wife to Husband after Marriage—Leave to Attack Gift under Fraudulent Conveyances Act.*

The repeal, by the Married Women's Property Act, R.S.O. 1927, ch. 182, of sec. 18 of the Act as found in R.S.O. 1914, ch. 149, had not the effect of reviving the husband's common law liability for the debts of his wife contracted before the marriage.

The plaintiff lent to E. L., before her marriage to J. H., a sum of money, and sought to recover a balance of the sum remaining unpaid, in an action against both husband and wife. It appeared that after the marriage the wife gave the husband a sum of money exceeding that which she owed the plaintiff; this the husband said was a present to him from his wife.

The action was dismissed as against the husband, but without prejudice to any action which the plaintiff might bring against him under the Fraudulent Conveyances Act.

THE following statement is taken from the judgment of MULOCK, C.J.O.:—

This in an action in the Ninth Division Court of the County of Wentworth wherein the plaintiff seeks to recover from the defendants, Joseph Hunt and his wife, Elizabeth Hunt, the sum of \$135.

On the 28th August, 1924, the plaintiff lent to the defendant, Elizabeth Hunt, then Mrs. George Lamb, a widow, now the wife of the defendant Joseph Hunt, the sum of \$200, and the amount in question in this action is the balance with interest owing to the plaintiff.

On the 16th July, 1927, Elizabeth Lamb was married to the defendant Joseph Hunt, and after such marriage she gave to him in July the sum of \$960. He claims that it was a present from her to him.

The learned trial Judge gave judgment for the plaintiff against the defendant Elizabeth Hunt and dismissed the action against Joseph Hunt with costs. From such dismissal the plaintiff appeals.

November 6, 1928. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and GRANT, J.J.A.

G. E. P. Shaver, for the appellant. The trial Judge erred in holding that sec. 18 of the Married Women's Property Act, R.S.O.

1914, ch. 149, not having been carried into the 1927 revision, R.S.O. 1927, ch. 182, the plaintiff can only rely on sec. 9 of the 1927 revision, and that this case does not come within that section. In any event, if the repeal of sec. 18 of the earlier Act has taken away the statutory liability of the husband, the appellant is entitled to rely on the common law liability as it was before the enactment: *Attorney-General for Quebec v. Nipissing Central Railway Co.*, [1926] 3 D.L.R. 545; *Beck v. Pierce* (1889), 23 Q. B.D. 316, at p. 321.

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W. *Schreiber*, for the defendant Joseph Hunt, respondent. The common law liability of the husband is not revived by the repeal of sec. 18. There can be no liability on the part of the husband under sec. 9 of R.S.O. 1927, ch. 182. In any event, the money received by the husband from his wife was repaid to her or was paid out by him on her behalf, and therefore there can be no liability.

January 14, 1929. The judgment of the Court was read by MULLOCK, C.J.O. (after setting out the facts as above):—The Married Women's Property Act, R.S.O. 1914, ch. 149, sec. 18, declared "that a husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage . . . to the extent of all property whatsoever belonging to his wife which he shall have acquired . . . through his wife . . . after deducting therefrom any payments made by him . . . in respect of which his wife is liable; but he shall not be liable for the same any further or otherwise."

This section was repealed by the Married Women's Property Act, R.S.O. 1927, ch. 182, but such repeal did not revive the husband's common law liability, and therefore the action was properly dismissed as against him.

The defendant Joseph Hunt says that the \$960 was a present from his wife to him; and the order of this Court should declare that the dismissal of this action is without prejudice to any action which the plaintiff may bring against him under the Fraudulent Conveyances Act.

The judgment below will be amended accordingly, and in other respects this appeal is dismissed with costs.

*Judgment below varied.*

[ROSE, J.]

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BROWN V. BARBER.

Jan. 15.

*Vendor and Purchaser—Option for Sale of Land which had Belonged to Deceased Intestate—Signature by Widow (Administratrix)—Shares Vested in Widow and Children by Virtue of Devolution of Estates Act—Absence of Authority to Bind Children—Attempt to Enforce Contract as to Individual Shares—Interest of Infants—Failure of Action for Specific Performance.*

B., who died intestate in 1920, left him surviving his widow and four children; letters of administration to his estate were granted to the widow; his debts, except a mortgage, were paid; and no caution had been registered before June, 1927, when the plaintiff made an offer for land which B. had owned. At this time the two younger children were infants. On the 28th June, 1927, the widow signed a document prepared by the plaintiff, whereby, in consideration of \$1 and other valuable consideration, she agreed to sell to the plaintiff all "marsh-lands owned by and belonging to the estate of my late husband in the township of A. . . . lying west of marsh-road . . . at the . . . price of \$5 per acre. This option expires August 28, 1927." The plaintiff communicated his intention of exercising the option, and brought this action against the widow and the four children, one being still an infant, for specific performance of the agreement:—

*Held*, that in June, 1927, no marsh-land belonged to the estate of B.; for what had been his had, under the Devolution of Estates Act, vested in the defendants, and as administratrix the widow had no power to sell.

There being, therefore, no ground for a judgment for the conveyance of the shares of the two younger children, the plaintiff sought, as against the other defendants, to compel specific performance with an abatement of the price:—

*Held*, upon the evidence, that the widow had no authority from the two elder children to contract as to their individual shares; and when she signed she did not sign as an owner disposing of her own property—her assertion that she had power to sell referring to what she supposed to be her power, as administratrix, to act for the estate—and she could not be compelled to convey her undivided interest.

*Semble*, that a judgment for the conveyance of the interests of the widow and one of her elder children who had approved of the agreement would work a hardship upon the other defendants, and for that reason also the decree ought to be refused.

AN action for specific performance of an agreement to sell certain marsh-land.

The action was tried before ROSE, J., without a jury, at Picton.

*H. J. Martin* and *R. E. Nourse*, for the plaintiff.

*W. S. Herrington*, K.C., for the defendants *Lottie M. Barber*, *Stanley Barber*, and *Reginald Barber*.



*W. H. Herrington*, for the defendant Clifford Barber.

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*Gordon Walmsley*, for the Official Guardian, representing the defendant Ethel Mae Barber, an infant.

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January 15. ROSE, J.:—William James Barber, deceased, was in his lifetime the owner of a farm and of certain marshland adjoining it, in the township of Ameliasburg, in the county of Prince Edward. He died in September, 1920, leaving him surviving his widow and his four children, Stanley, Reginald, Clifford, and Ethel Mae, who are the defendants, and letters of administration to his estate were in October, 1920, granted to Mrs. Barber. No caution had been registered before the time of the transaction which has given rise to this litigation (June, 1927), and the debts of the estate, except a mortgage, had been paid. At the time last mentioned, Clifford and Ethel Mae were infants, but Clifford attained his majority before the action was commenced. Mrs. Barber and Reginald, Clifford, and Ethel Mae live on the farm; Stanley has a farm of his own, two or three miles away.

In the summer of 1927, the plaintiff and F. M. Johnston were desirous of acquiring land suitable for the breeding of muskrats. They had one or two conversations with Reginald Barber, who said at first that his family's marsh was not for sale, and they arranged to engage him as caretaker of any land that they might buy in the neighbourhood. In the course of a later conversation Reginald intimated that the Barbers were ready to sell, and he went with the plaintiff and Johnston to the farmhouse to see Mrs. Barber. The plaintiff told Mrs. Barber that he was not ready to buy, but that he would like to have an option for 30 or 60 days, so that he might pursue inquiries as to the total area procurable; and the price, \$5 an acre, was discussed. Mrs. Barber stated that the land belonged to her husband's estate, and it was made plain in some way that any contract that she might make would be made by her as representing the estate, and the plaintiff knew that the girl, Ethel Mae, was an infant, and perhaps he was told that Clifford also was under age. I am not sure that he was told, as Mrs. Barber and some of her children say he was, that the Official Guardian would have to be consulted before any agreement to sell could be made effective. Mrs. Barber said that she would not make any agreement without first ascertaining the views of her eldest son, Stanley. The plaintiff offered to drive her in his car to Stanley's house. She would not go, but she said that one of the boys could go with the plaintiff to see Stanley, and Clifford did go.

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The reports of the interview between the plaintiff and Stanley Barber, and of what was said when the plaintiff and Clifford returned to Mrs. Barber's house, are divergent, and there is difficulty in making a positive finding. It was made plain to Stanley that the land that the plaintiff might buy from the Barbers lay to the west of a road that runs north and south across the marsh; and Stanley says, and I think it is true, that he said that he would not consider the sale of a certain comparatively small parcel that lies to the south of a certain road that runs east and west. As to the remainder of the land lying to the west of the road that runs across the marsh, Stanley said that he would not stand in the way if "the others" (meaning, as he says, his family and the owners of other parcels forming part of such a tract as would be sufficient for the plaintiff's purposes, or meaning, perhaps, his family) were desirous of selling. This much Stanley admits. The plaintiff, however, says that Stanley went much farther—that he instructed Clifford to authorise Mrs. Barber to proceed. I am inclined to accept Stanley's version of the conversation. He did state what his attitude towards a sale would be; but I do not think that he expressed himself as authorising his mother to enter into a contract on his behalf or on behalf of the family as a whole; or perhaps I ought to put it rather that I have so much doubt about his having done so that I am unable to find that, when Mrs. Barber signed the option on which the action is founded, she had Stanley's authority to bind him.

When the plaintiff and Clifford returned to Mrs. Barber's house some one—I think it was the plaintiff, and not, as the plaintiff says, Clifford—told Mrs. Barber that Stanley approved; and after Mrs. Barber had had some talk with Reginald and Clifford, and after she had been told by Clifford that the plaintiff had said she would not be bound by, or held to, the option if she changed her mind, the plaintiff prepared the option and she signed it. Whether the plaintiff had made the statement, or whether Clifford had confused some statement made as to the plaintiff's inability to say at the moment that he would buy the land, I do not know; but I think it is reasonably plain that Mrs. Barber was under the impression that she was not committing herself irrevocably by signing. I am inclined to think that, when she swore that the plaintiff had made to her a statement similar to the statement reported to her by Clifford, she was confused. I think, as I have said, that she believed that the statement had been made, but I think that probably her belief

was founded upon what Clifford had said and not upon any statement made by the plaintiff to her directly. About this, however, I am not very sure. The plaintiff admits that he told her that she was not selling; and it is quite possible that really he went so far as to say that she was not binding herself to sell.

The option is in these words: "June 28, 1927. For the sum of one dollar and other valuable consideration receipt of which is hereby acknowledged I do hereby agree to sell to Lee M. Brown of Port Rowan, Ont., all marsh-lands owned by and belonging to the estate of my late husband in the township of Ameliasburg county of Prince Edward said lands lying west of marsh-road connecting Huff's Island with Massassaga at the sum or price of five dollars per acre.

"This option expires August twenty-eight nineteen hundred and twenty-seven.

"Witness: F. M. Johnston.

Lottie M. Barber."

The plaintiff did not in any very formal way, before Mrs. Barber had announced her intention not to proceed, give notice that he exercised the option; but he seems to have made it known in some way that he was buying the land. On the 8th July, 1927, he got Mrs. Barber to sign another option, expiring on the same day as the first, and his solicitors wrote to Mrs. Barber, referring to the second option, accepting the title, asking for submission of a draft deed, enclosing a cheque for \$100, and stating their readiness to pay the balance of the purchase-price upon delivery of the deed. This second option was supposed by Mrs. Barber to be in effect a duplicate of the first; but in fact it covers land lying to the east of the road across the marsh, which admittedly was not intended to be sold; it refers to "all the marsh-land owned by me or my late husband," and Mrs. Barber's attention was not directed to the inclusion of the words *me or*; and the plaintiff's counsel does not suggest that it is binding. Therefore, the solicitors' letter of the 8th July, which is an acceptance of the offer set out in the second option, can scarcely be treated as an exercise of whatever right the plaintiff may have had to purchase the lands described in the first; but, although the evidence as to the manner in which the plaintiff made known his intention of exercising the power purported to be given by the first option is hazy, the defendants do seem to admit that the intention was communicated, and I am inclined to think that it cannot be said that the plaintiff has failed to prove that he accepted the offer before it was revoked. The question, however, is not free from doubt.

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In June, 1927, no marsh-land belonged to the estate of Mrs. Barber's late husband; what had been his had under the statute vested in the defendants; and as administratrix Mrs. Barber had no power to sell. It is plain, therefore, that there cannot be judgment for the conveyance to the plaintiff of the shares of the infants, Clifford and Ethel Mae. The plaintiff, however, desires, as against the other defendants, to compel specific performance with an abatement of the price.

What has been said about the interview between the plaintiff and Stanley disposes of the case against Stanley. As to a portion of the land—the parcel lying to the south of the road that runs east and west—Stanley did not even express a willingness to sell, and as to the rest it is not proved that he authorised his mother to make a sale of his share.

Reginald expressed himself as willing that his mother should sign the option. Subject, then, to what would have to be said about the allegations of misrepresentations as to the effect of the document and as to other matters, in case the necessity for considering those allegations arose, Reginald is bound if his mother is bound and if his consent to her signing for the estate is equivalent to a consent to her signing for him as the owner of an undivided interest in the land. Then as to Mrs. Barber: she did not hold herself out as the owner of the land, and the plaintiff did not suppose that she was the owner. On the contrary, he knew that, while she signed her name without the addition of the word "administratrix," she was professing to act only in a representative capacity; and, without stopping to inquire as to whether in that capacity she had any power at all, he took her signature for what it was worth. There was no idea in the mind either of the plaintiff or of Mrs. Barber of making a contract as to the several shares of the persons beneficially interested in the estate; the idea was that the estate as a whole should give an option, and Mrs. Barber was looked upon as the person to sign on behalf of the estate. It is true that she did not sign until she had learned, or thought she had learned, the opinions of her sons, or of two of them; but it was their opinions as to what was for the benefit of the estate that she sought, not their authority to contract as to their individual shares; and when she signed she did not sign as an owner disposing of her own property.

The case, then, is entirely different from those cases relied upon by Mr. Martin—some of them discussed by Boyd, C., in *Kennedy v. Spence* (1911), 24 O.L.R. 535, and mentioned in Fry on Specific Performance, 6th ed., arts. 1257 *et seq.*—in which a



person makes a contract to sell land, without disclosing, perhaps without knowing, that his title is incomplete. In those cases it is but reasonable that the vendor should be compelled to do all that he can towards carrying out his contract, and he is ordered to convey what he has. But here, where the idea was to sell the family's land, and not land of which Mrs. Barber professed to be the owner, a judgment such as the plaintiff seeks would not be a judgment for the performance of the contract to the extent to which Mrs. Barber is able to perform it; it would be rather a judgment for the partial performance of a contract that never was in contemplation. I am not overlooking the fact that the plaintiff says that Mrs. Barber said she had power to sell. I do not believe that she made any unqualified statement to that effect; but even if she did she meant, and the plaintiff knew that she meant, not that she was a part owner and had power to act for the other part owners, but that as administratrix she had power to act for the estate: see *Wilson v. Patterson* (1918), 39 D.L.R. 642. For these reasons, I think that Mrs. Barber cannot be compelled to convey her undivided interest; and if Mrs. Barber is not bound, certainly Reginald is not.

Having reached the opinion just stated, I do not think it necessary to consider the other defences discussed by counsel, but I may perhaps say that it seems to me as at present advised that there is a good deal to be said for the contention that judgment for the conveyance of the interests of Mrs. Barber and Reginald would work a hardship upon the other defendants, especially upon the infant, and that for that reason the decree ought to be refused. It may well be that if the family as a unit deals with the lands, Ethel Mae's share will be worth more to her than it would be worth after the plaintiff, having been brought in as a co-owner, had compelled partition.

The action will be dismissed with costs.

Rose, J.

1929.

BROWN  
v.  
BARBER.

## [APPELLATE DIVISION.]

1929.

RE HARDING,

Jan. 23.

*Infant—Custody—Application by Mother under Infants Act, R.S.O. 1927, ch. 186—Remedy in Personam against Father—Infant not within Territorial Jurisdiction of Ontario Courts—Proceedings by Habeas Corpus—Powers of Court of Chancery before Passing of Infants Act—Issue as to Custody Directed to be Tried—Interim Custody Awarded to Mother.*

The Court has jurisdiction to make an order as to the custody of an infant although the infant is beyond the territorial jurisdiction of the Court.

*Penn v. Lord Baltimore* (1750), 1 Ves. Sen. 444, and *Hope v. Hope* (1854), 4 De G. M. & G. 328, followed.

*Re Gay* (1926), 59 O.L.R. 40, distinguished.

*Re Shand* (1928), 62 O.L.R. 145, overruled.

The right to relief under the Infants Act, R.S.O. 1927, ch. 186, while in a sense alternative to that available by way of *habeas corpus*, is neither dependent upon nor co-incident with that form of relief.

*Quere*, whether a writ of *habeas corpus* will be granted where the subject of it is beyond the Court's jurisdiction.

Before the passing of the Infants Act (now R.S.O. 1927, ch. 186), Courts of equity exercised powers as to the custody of infants much wider than those exercised at common law by means of *habeas corpus*.

*Barnardo v. Ford, Gossage's Case*, [1892] A.C. 326, referred to.

The trial of an issue as to the custody of the infant was directed, and on account of the conduct of the father in deliberately removing the infant from Ontario after legal proceedings had been commenced or threatened, it was ordered that the child should be restored to the custody of her mother pending the final determination of the issue.

*Per RIDDELL, J.A.*:—The statutory power and duty of the Court in dealing with infants, their custody, etc., are not limited to that exercised by the Court of Chancery in England as representing the King in his capacity of *parens patriæ*.

MOTION by Rose Anne Harding, the mother of Pearl Harding, an infant, under the Infants Act, for an order awarding the applicant the custody of the infant, as against Harry Harding, the applicant's husband and the father of the infant.

The motion was referred to a Divisional Court of the Appellate Division by ROSE, J., before whom, in Chambers, it was originally made.

January 22. The motion was heard by LATCHFORD, C.J., and RIDDELL, ORDE, and FISHER, JJ.A.

W. W. Parry, for the applicant.

E. C. Bogart, for Harry Harding, respondent.

January 23. ORDE, J.A.:—This is a motion by the mother for an order that she have the custody of the infant, the child of her marriage with the respondent. App. Div.  
1929.

Upon the return of the motion before Mr. Justice Rose it appeared that the infant had been taken by the father to his parents in Prince Edward Island, and was then in their care by arrangement with him and under his direction; and it was objected that the Court had no jurisdiction to make any order as to the custody of the infant because the infant herself was then outside the territorial jurisdiction of the Ontario Courts. RE HARDING.  
Orde, J.A.

In support of this objection the father relied upon the judgment of Mr. Justice Wright in *Re Shand* (1928), 62 O.L.R. 145, where it was held that in applications under the Infants Act it must be established that the infant is within the jurisdiction of the Court. The context makes it clear that by "within the jurisdiction of the Court" was meant "within the territorial jurisdiction of the Court."

Mr. Justice Rose, deeming this decision "to be wrong and of sufficient importance to be considered in a higher Court," referred the motion to this Court, under the provisions of subsec. 3 of sec. 31 of the Ontario Judicature Act, R.S.O. 1927, ch. 88, and it is in this form that the matter comes before us.

I find myself unable to agree with the decision in *Re Shand*. The learned Judge in that case was of the opinion that "proceedings under the Infants Act are an alternative procedure to that available by way of writ of *habeas corpus*," and that consequently "the jurisdiction must be limited to cases where a writ of *habeas corpus* would be granted." He then states: "I think the law is well settled that a writ of *habeas corpus* will not be granted where the person directed to be produced in court is without the jurisdiction;" and refers to *Barnardo v. Ford, Gospage's Case*, [1892] A.C. 326.

Being of the opinion that this right to relief under the Infants Act, while in a sense an alternative to that available by way of *habeas corpus*, is neither dependent upon nor co-incidental with that form of relief, it is perhaps unnecessary to discuss the statement that a writ of *habeas corpus* will not be granted when the subject of it is beyond the Court's jurisdiction; but it is to be noted that the *Barnardo* case just mentioned is not quite an authority for any such sweeping statement, for there, oddly enough, when the Queen's Bench Division had ordered a writ of *habeas corpus* to issue to bring into Court a child who had been sent to Canada before the proceedings began, the Court of Appeal

App. Div. and the House of Lords refused to set it aside. It is fair, how-  
1929. ever, to say that the ruling of the House of Lords in affirming  
RE HARDING. the judgment of the Court of Appeal appears to have been upon  
Orde, J.A. the ground that until a return to the writ had been made it was  
premature to deal with the question whether or not a writ so  
issued could be enforced. The Law Lords were apparently of  
the opinion that any contumacious act on the part of the person  
who, having the custody of the child, had sent it abroad to evade  
the powers of the Court, ought to be treated as a contempt for  
which he was answerable to the Court, and that a writ of *habeas  
corpus* should not "be wrested from its proper purpose and used  
as an instrument to punish a man for an illegal or unauthorised  
act complete before the jurisdiction of the Court can be supposed  
to have attached." See Lord Watson at p. 335 and Lord Mac-  
naghten at p. 341.

Before the passage of the Infants Act, courts of equity exer-  
cised powers as to the custody of infants much wider than those  
exercised at common law by means of *habeas corpus*. And, while  
a court of equity might upon occasion grant a *habeas corpus*, the  
court's powers to grant relief were not confined to that form, but  
might be exercised summarily upon petition.

Now by sec. 3 of the Infants Act, R.S.O. 1927, ch. 186, "In  
questions relating to the custody and education of infants the  
rules of equity shall prevail."

That that jurisdiction operates *in personam*, and is not ne-  
cessarily fettered by the fact that the subject-matter involved is  
beyond the territorial jurisdiction of the Court has been recog-  
nised ever since the decision in *Penn v. Lord Baltimore* (1750),  
1 Ves. Sen. 444, 1 W. & T.L.C. in Eq., 9th ed., p. 638.

That principle was applied in a way that I think is clearly  
binding upon us in *Hope v. Hope* (1854), 4 DeG. M. & G. 328.  
There it was laid down that the Court of Chancery had jurisdic-  
tion over the custody of the children of an English subject,  
though such children were born and were at the time of the judg-  
ment resident abroad. And Lord Cranworth, L.C., at pp. 345  
to 347, makes it clear that the jurisdiction of the Court is in no  
way affected by the fact that there might be no means of en-  
forcing it. He points out that there may be cases where it is in-  
expedient to make any order; but that the Court has jurisdiction  
he has no doubt.

His reasoning at the pages mentioned is peculiarly applicable  
here. Nor is there anything in the judgment of this Court in  
*Re Gay* (1926), 59 O.L.R. 40, inconsistent with this view. What



was held there was that, whatever the jurisdiction of a foreign court might be over infants within this Province, our courts had jurisdiction over them by reason of their being within this Province. Lord Cranworth, at the pages mentioned, refers to the jurisdiction of the English courts over foreign children within England. The two forms of jurisdiction are not inconsistent. It is possible to conceive of a clash of authority in such cases, but the rules of comity between nations and their respective courts usually take care of such cases when they actually arise.

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RE HARDING.

Orde, J.A.

For these reasons I think we have ample power to make any such order under the Infants Act as the circumstances warrant.

Mr. Justice Rose stated that, upon the material before him, he thought the mother ought to have the custody of the child, who is only four years of age, but subject to such variation as it might be necessary to direct after the trial and determination of an issue.

Subsequent to his judgment an order was made by the Rolls Court in Chancery in Prince Edward Island, upon the application of the mother, in the course of which the father appeared, that the decision of the question be deferred pending the final decision of the Supreme Court of Ontario, in the suit pending here, and directing that in the meantime the infant remain in the custody of the grandparents. There were further provisions as to security, access, etc., and further consideration and leave to apply were reserved.

Were it not for the conduct of the father, I should feel inclined to make no order as to the interim custody of the infant, but it seems clear that the father deliberately removed the infant from this Province after legal proceedings had been commenced or threatened, with the object of getting her beyond the jurisdiction of this Court. Under these circumstances, I think the child ought to be restored to the mother pending the final determination of the issue which our order will direct.

There is at present an action for alimony pending between the parties in which issue has been joined. In that action also the applicant here seeks the custody of the infant.

In my judgment we ought to order:—

(1) That the father do forthwith deliver the child or cause her to be delivered to the mother, who shall keep her within this Province until the final determination of the question as to her custody.

(2) That an issue be directed to be tried as to the custody of the infant, in which the mother shall be the plaintiff and the

App. Div. father the defendant, such issue to be set down and tried at the same time as the alimony action now pending.

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RE HARDING.

Orde, J.A.

(3) The order may embody such terms as are desirable as to expediting the trial of the issue and of the action.

The applicant asks that the order direct the issue of a writ of *habeas corpus*. I cannot see what useful purpose can be served thereby. In view of what I have quoted above from the *Barnardo* case, the issue of such a writ, in the circumstances, would seem to be improper. Our order, operating as it does *in personam*, is as effective as any writ could be.

The costs of this motion before Rose, J., and this Court ought to be in the cause, as will of course those of the trial of the issue, the whole to be dealt with by the trial Judge.

LATCHFORD, C.J.:—I agree and have nothing to add.

RIDDELL, J.A.:—As at present advised, I do not think that our statutory power and duty in dealing with infants, their custody, etc., are limited to that exercised by the Court of Chancery in England as representing the King in his capacity of *parens patriæ*, but I am of opinion that, even under that practice, the mother is entitled to her order. I concur in the judgment of my brother Orde.

FISHER, J.A., agreed with ORDE, J.A.

*Order as stated by ORDE, J.A.*

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[IN BANKRUPTCY.]

1929.

RE A. PUCCINI & Co. LTD.

Feb. 14.

*Bankruptcy—Claim of Crown to Priority for War Revenue Tax—Special War Revenue Act, 1915—Amendment by 12 & 13 Geo. V. ch. 47, sec. 17—Repeal of sec. 17 by 15 & 16 Geo. V. ch. 26, sec. 9—Interpretation Act, R.S.C. 1927, ch. 7, sec. 19 (c)—Lien of Crown—Bankruptcy Act, R.S.C. 1927, ch. 11, secs. 125, 188.*

The Crown (Dominion) claimed a lien for war revenue taxes due prior to the 1st July, 1925, on assets of the insolvent debtor-company acquired before and after that date. Section 17 of (1922) 12 & 13 Geo. V. ch. 47, amending the Special War Revenue Act, 1915, upon which the claim was based, was repealed by sec. 9 of (1925) 15 & 16 Geo. V. ch. 26, the repeal becoming effective on the 1st July, 1925:—

*Held*, that any assets acquired by the debtor-company after the 1st July, 1925, were not subject to a lien for taxes which had accrued

due and were payable before that date; but, if there became vested in the trustee by the authorised assignment assets acquired prior to the 1925 repeal, the lien of the Crown remained; and out of these assets the Crown was entitled under sec. 17 to be paid, after satisfaction of the trustee's charges and expenses, in priority to the claims of all other creditors, including claims by a municipality under a provincial statute.

Any lien the Crown had before the 1st July, 1925, was not discharged by the repealing Act of 1925: Interpretation Act, R.S.C. 1927, ch. 1, sec. 19 (c).

By sec. 188 of the Bankruptcy Act, R.S.C. 1927, ch. 11, the claim of the Crown is subject to sec. 125 (formerly sec. 51 (6)).

The lien of the Crown is, therefore, only on such assets as were acquired before the 1st July, 1925, and had actually come into the possession of the trustee.

*Re Wilner* (1928), 33 O.W.N. 326, 8 C.B.R. 616, explained.

AN appeal by the Crown from an order of the Registrar in Bankruptcy.

*G. A. Urquhart*, K.C., for the Crown.

*A. Courtney Kingstone*, K.C., for the Corporation of the City of St. Catharines.

*D. F. Pepler*, for the trustee in bankruptcy.

February 14. FISHER, J.A.:—The question involved in this appeal is, what priority, if any, has the Crown for war revenue tax due prior to the 1st July, 1925, on assets of the insolvent debtor-company acquired prior to and since that date?

The debtor-company assigned on the 1st September, 1927. The trustee has converted the estate and has in his possession for distribution about \$3,700, less the costs and expenses of administration. The Crown filed with the trustee a claim for \$5,251.52, war revenue tax, and claims a lien on the assets of the debtor-company and priority of payment over all other claims, except the trustee's expenses and the costs of administration.

It is admitted that the insolvent debtor-company had assets on hand prior to the 1st July, 1925, amounting to \$13,965.50, and assets acquired since that date of \$5,185.89. The Crown's claim for a lien is based on sec. 17 of the Act (1922) 12 & 13 Geo. V. ch. 47, amending the Special War Revenue Act, 1915. Section 17 was repealed and the repeal became effective on the 1st July, 1925: see sec. 9 of the Act (1925) 15 & 16 Geo. V. ch. 26.

The amount of the Crown's claim is not in dispute.

The Crown claims priority of payment out of all the assets acquired and realised by the trustee prior and subsequent to the repealing Act of 1925.

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Fisher, J.A. For the Municipality of St. Catharines it is argued that the  
1929. Crown is not entitled to a lien on any part of the assets or alter-  
nately in respect to those assets acquired subsequent to the 1st  
RE July, 1925.  
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The learned Registrar, following my judgment in *Re Wilner* (1928), 33 O.W.N. 326, 8 C.B.R. 616, decided that any lien the Crown had was discharged by the repealing Act of 1925, and the Crown was only entitled to rank as an ordinary creditor in the preferred class. When *Re Wilner* was before me, my attention was not called to sec. 19 of the Interpretation Act, R.S.C. 1927, ch. 1; sec. 19(c) makes it quite clear that any lien the Crown had prior to the 1st July, 1925, was not discharged by the repealing Act of 1925; but, nevertheless, I still think that when sec. 17 was repealed it was for the purpose of removing the embarrassment that merchants and others were under, in conducting their businesses, of having assets which were changing from day to day tied up with a lien in favour of the Crown, and that these merchants, after the 1st July, 1925, fully believed that any lien the Crown had acquired was discharged. Parliament, however, did not so state in the repealing Act, and therefore any lien acquired prior to 1925 still subsists, but only as against such assets as were owned by the insolvent debtor prior to the 1st July, 1925.

I am of the opinion that any assets acquired by the debtor-company after the 1925 repeal were and are not subject to and charged with a lien in favour of the Crown in right of the Dominion for war revenue tax which accrued due and was payable prior to that date. It is altogether probable that, as the insolvent debtor-company was engaged in a mercantile business and its assets were changing from day to day, at the date of the authorised assignment there were no assets acquired prior to the 1st July, 1925, then in existence. If so, the Crown in right of the Dominion is entitled to rank and be paid only as a preferred creditor. If, however, it is proved that there vested in the trustee at the time of the authorised assignment assets acquired prior to the 1925 repeal, the lien and charge in favour of the Crown remains, and as to these the Crown is entitled under sec. 17 to be paid, after the trustee's charges and expenses are satisfied, in preference and priority to the claims of all other creditors, including claims by a municipality under a provincial statute. See *Re Adams Shoe Co. Ltd.* (1923), 4 C.B.R. 230, 375, 54 O.L.R. 625, and *Attorney-General for Ontario v. Attorney General for the Dominion*, [1896] A.C. 348.

The amounts due to the municipality, I understand, are not



in dispute, and the only question for determination is the priority of payment. Fisher, J.A.

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I have decided in previous cases that, if there were on the premises, at the time of the assignment or receiving order, goods belonging to the insolvent debtor liable to be distrained for taxes, including business tax; and, if the collector of the municipality had notified the trustee, as required by the Ontario statute of 1922, 12 & 13 Geo. V. ch. 78, sec. 24, enacting a new subsec. 11 of sec. 109 of the Assessment Act, R.S.O. 1914, ch. 95, the municipality is entitled to be paid in priority under sec. 125 (formerly sec. 51(6)) of the Bankruptcy Act.

I also decided in *Re Andrew Motherwell of Canada Ltd.* (1922), 22 O.W.N. 612, 3 C.B.R. 95, that a claim for power, light, and water rates, due to a municipality, is entitled to priority over the claims of unsecured creditors, as "taxes, rates or assessments," coming within the meaning of sec. 51 (6) of the Bankruptcy Act, now sec. 125. See also *Re Decker's Delicatessen* (1924), 5 C.B.R. 208, 56 O.L.R. 140.

In the present case, by sec. 188 of the Bankruptcy Act, the claim of the Crown in right of the Dominion is subject to sec. 125, formerly sec. 51 (6). The result is that the Crown in right of the Dominion is entitled to a first charge only on such assets of the debtor as were acquired prior to the 1st July, 1925, and had actually come into the possession of the trustee. If these assets have been converted by the trustee, the proceeds are so charged in favour of the Crown, less the trustee's costs and expenses incidental to the administration of the estate. If it is not possible to identify any of the assets in the trustee's possession, acquired prior to the 1st July, 1925, the Crown is bound by sec. 188 and entitled to rank and be paid *pari passu* with all the other preferred creditors under sec. 125.

Let judgment be entered according to these findings; costs of all parties payable out of the estate.

[IN CHAMBERS.]

RE MONARCH DRESS CO. LTD. V. AARONSON.

1929.

Feb. 15.

*Division Courts—Jurisdiction—Action on Foreign Judgment—Amount not Ascertained by Signature of Defendant—Division Courts Act, R.S.O. 1927, ch. 95, sec. 54 (c)—Offer to Abandon Excess—Division Court Rule 4—Consent to Jurisdiction—Inefficacy—Costs.*

The plaintiffs sued in a Division Court for the amount of a judgment of a Quebec Court, \$287.17, and recovered judgment for that amount.

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—  
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MONARCH  
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The defendant moved for an order prohibiting the Judge and Clerk of the Division Court from enforcing the judgment, on the ground that the amount of it was beyond the jurisdiction of a Division Court (Division Courts Act, R.S.O. 1927, ch. 95, sec. 54 (c) ), and the plaintiffs offered to abandon the excess:—  
*Held*, that the amount of the judgment was not ascertained by the signature of the defendant.  
The want of jurisdiction appearing on the face of the proceedings, prohibition may be granted either before or after judgment.  
By Division Court Rule 4, a plaintiff may abandon the excess, but not after judgment.  
A total want of jurisdiction cannot be cured by the consent of the parties.  
The enforcement of the judgment being prohibited, the plaintiffs may yet recover in a court having jurisdiction.  
The objection as to jurisdiction not having been taken in the Division Court, there should be no costs of the motion.  
Collection of authorities on the questions decided.

MOTION by the defendant for an order prohibiting the Judge and Clerk of the Eighth Division Court of the County of York from enforcing a judgment obtained in that Court by the plaintiffs against the defendant for payment of \$287.17 and interest and costs, less \$34.01 paid into court by the defendant.

February 15. The motion was heard by LOGIE, J., in Chambers.  
*H. M. Goodman*, for the defendant.  
*J. M. Bennett*, for the plaintiffs.

February 15. LOGIE, J.:—The claim in the Division Court was, according to the particulars filed, as follows:—  
Amount of judgment of the Superior Court, Montreal,  
Quebec .....\$ 234.01  
Costs allowed ..... 48.70  
Interest on \$282.71 from August 1, 1928, to November  
25, 1928, at 5% ..... 4.46  
  
\$ 287.17

The judgment in the Montreal Court, dated the 17th October, 1928, was for \$234.01, the amount of a promissory note signed by the defendant at Montreal on the 14th day of June, 1928, payable on the 29th day of July after date, to the plaintiff, with interest from the 1st day of August, 1928.  
The defendant did not dispute the jurisdiction of the Eighth Division Court of the County of York, and, for reasons I need not discuss here, did not appear; but in his dispute-note admitted that he owed the plaintiff \$234.01, paid into court \$34.01, and

counterclaimed for certain services performed for the plaintiffs the sum of \$200.

At the trial, after hearing evidence as to the service of the writ in the Montreal action, the trial Judge allowed the plaintiffs' claim and dismissed the defendant's counterclaim.

The defendant moved for a new trial both of claim and counterclaim. The learned trial Judge dismissed the application for a new trial of the plaintiffs' claim, but allowed the defendant to re-open his counterclaim.

Subsequently the counterclaim came before another Judge and it was dismissed.

The defendant now moves for prohibition in respect of the plaintiffs' claim, and the plaintiffs now offer to abandon the excess over \$200.

No order of the trial Judge was obtained allowing the costs incurred in obtaining judgment in the Province of Quebec, pursuant to sec. 53 of the Ontario Judicature Act, R.S.O. 1927, ch. 88; but, in my view, this is not a determining factor.

The plaintiffs did not sue on the note. They elected to sue on their Montreal judgment.

That a foreign judgment against the maker of a promissory note represents a simple contract debt only, and not one ascertained by the signature of the defendant, admits of no doubt: *Re McMillan v. Fortier* (1901), 2 O.L.R. 231. The limit of the jurisdiction of the Division Court is \$200: Division Courts Act, R.S.O. 1927, ch. 95, sec. 54(c).

And, that being so, the want of jurisdiction appears on the face of the proceedings and prohibition may be granted either before or after judgment: *Nerlich v. Clifford* (1874), 6 P.R. 212; *In re Summerfelt v. Worts* (1886), 12 O.R. 48. Nor can an amendment be allowed now to give jurisdiction in the Division Court, although the plaintiff seeks to abandon the excess. By Rule 4, formerly Rule 7, this may be done before judgment only: *Re White v. Galbraith* (1888), 12 P.R. 513, commented on in *Cleveland Press v. Fleming* (1893), 24 O.R. 335, at p. 337; *Re Elliott v. Biette* (1892), 21 O.R. 595; *Trimble v. Miller* (1892), 22 O.R. 500; *Re Lott v. Cameron* (1898), 29 O.R. 70; *Pegg v. Howlett* (1897), 28 O.R. 473, at p. 476.

Nor, if there was anything amounting to waiver of jurisdiction or consent, can a total want of jurisdiction be cured by the consent of the parties: *Jones v. Owen* (1848), 5 D. & L. 669; *De Haber v. Queen of Portugal* (1851), 17 Q.B. 195, 213;

Logie, J.

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Logie, J. *Farquharson v. Morgan*, [1894] 1 Q.B. 552; *Lee v. Cohen* (1894)  
1929. 71 L.T.R. 824.

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The claim being on the face of it in excess of the jurisdiction of the Court, without taking into account either interest or costs, it is useless to discuss prohibition *quousque* or partially as to the excess or the severability of either interest or costs.

Prohibition will go to the Judge and Clerk of the 8th Division Court of York, preventing the enforcement of the judgment in question, which is a nullity: *Keating v. Graham* (1895), 26 O.R. 361; *Briscoe v. Stephens* (1824), 2 Bing. 213; but the plaintiffs may recover in a court having jurisdiction: *Briscoe v. Stephens*.

The defendant not having taken the objection as to jurisdiction in the court below, there will be no costs: *Nerlich v. Cliford (supra)*.

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[McEVOY, J.]

1929. SHERRILL v. KING EDWARD HOTEL CO. LTD.  
Feb. 22.

*Innkeeper—Liability for Value of Goods Stolen from Bedroom of Guest—Custom—Innkeepers' Act, secs. 4, 6—Notice—Failure to Post in Room—Notice of Fact that Vault for Valuables Available—Conduct of Guest—Reasonable Care.*

Money and valuable precious stones and jewels were in June, 1922, stolen from the plaintiff's bedroom in the defendant company's hotel, of which he was a guest, and which was an inn within the meaning of the Innkeepers' Act, R.S.O. 1914, ch. 173, and he sued the defendant company for the value of the things stolen:—

*Held*, that the duties, liabilities, and rights of innkeepers with respect to goods brought to inns by guests are founded, not upon bailment, or pledge, or contract, but upon the custom of the realm; and an innkeeper cannot escape his liability safely to keep his guest's goods by shewing that he, the innkeeper, was not negligent.

*Robins & Co. v. Gray*, [1895] 2 Q.B. 501, and *Butler and Co. Ltd. v. Quilter* (1900), 17 Times L.R. 159, followed.

By sec. 4 of the Act, an innkeeper is not liable to make good to a guest any loss of goods (with certain exceptions not material here) to a greater value than \$40, except where the goods have been stolen or lost through the wilful act, default, or neglect of the innkeeper or his servant, or where such goods have been deposited expressly for safe custody with the innkeeper. And, by sec. 6, a notice setting out sec. 4 must be posted and kept posted conspicuously in every bedroom of the inn:—

*Held*, upon the evidence, that the notice was not posted in the plaintiff's bedroom; and, although the plaintiff had actual notice that there was a vault in the inn, a place of safety of the use of which guests might avail themselves, that was not enough to secure to the innkeeper the benefits of the Act.



*Held*, also, that the plaintiff's conduct in shewing his collection of precious stones to persons in the hotel, more or less publicly, was not such negligence as to deprive him of his rights against the innkeeper—he took such care as a prudent man might reasonably be expected to take in the circumstances.

Review of the authorities.

The defendant company was found liable to the plaintiff in damages.

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AN action to recover the value of goods alleged to have been stolen from the plaintiff's room while he was a guest in the defendant company's hotel.

The action was tried by McEvoy, J., without a jury, at a Toronto sittings.

*R. S. Robertson*, K.C., for the plaintiff.

*T. J. Agar*, K.C., for the defendant company.

February 22. McEvoy, J.:—This is an action brought by Charles L. Sherrill against the defendant, a keeper of an hotel in the city of Toronto, which is an inn within the meaning of the Innkeepers' Act, R.S.O. 1914, ch. 173.

The plaintiff at the time of the happenings complained of was a traveller of more than the usual experience of persons who travel much upon this continent, as to the ways and practices of hotels of the better class, as is the defendant's hotel.

The plaintiff had been a patron of the defendant's hotel many times during a series of years prior to the date of the loss he claims to have sustained, which loss is the subject-matter of this litigation.

On the 13th June, 1922, the plaintiff registered his name in the defendant's hotel register, and was assigned by the room-clerk to room 709, a room he would have of choice, and was received and accepted by the defendant as a guest and patron of the hotel or inn, in the usual manner, and he continued to be such guest until after the loss complained of in this action. He had registered and been received in the same way, and was a guest of the hotel, from the 4th June, 1922, onward for several days; so also on each of several dates in March, April, and May, 1922.

After the registration of the 13th June, 1922, all went well until the night of the 23rd June, 1922. On that evening "A. R. Lawrence, Detroit, Mich.," registered and was assigned room 710, situate on the same hall as room 709. A. R. Lawrence paid his bill and left the hotel at between 3 and 4 o'clock in the morning of the 24th June, 1922.

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Room 711 on the same hall was occupied by a Mr. Lyons. Some time before eight o'clock on the morning of the 24th June, Lyons complained to the hotel authorities of having lost some property during that same night out of his room. An investigation by the hotel authorities was instituted, and resulted in the finding of papers belonging to Sherrill, the plaintiff in this action, in the toilet of room 710, which room that night had been occupied by "Lawrence." This led to the arousing of Sherrill in room 709. He was somewhat deaf. His door was pounded upon by the house-detective, the assistant-manager, and Alice M. Parrott, the latter being a housekeeper in the hotel. It was there found that Sherrill's door was locked and that the key still remained in the lock. I find that Sherrill locked his door upon retiring and left the key in the lock; that the door could not be unlocked by a key put in from the outside of the door; that Sherrill had a large quantity of precious stones and jewelry in his pockets together with a sum of money, probably \$200 or \$300; that, upon investigation made at this time and later when a city detective joined the hotel people, it was found that the window of the room in which Sherrill was sleeping stood with the lower half of the sash raised; that there was a ledge running along below the windows of the 7th storey situate on the south wall of the hotel; and that the person who entered Sherrill's room and stole his precious stones, jewelry, and money, entered by making his way along this ledge to opposite Sherrill's window and also opposite to Lyons's room window. I find these facts, found by the investigators to be the true facts, and these facts are proven by the evidence given before me.

The hotel authorities and the plaintiff expected to secure a return of the plaintiff's property; and, although the writ was issued on the 7th October, 1922, the case was not brought to trial until 1928. I hold that neither party has a right to have the Court make any unfavourable inference from that fact against the opposite party. The one was as well as the other hoping to reach an arrangement without actually trying out the case, and one ought not to be allowed to get any advantage of the other on this score.

At the trial no serious effort was made to deny that the plaintiff had lost valuable property. Upon the plaintiff's own case I was not at all sure that the property was of great value, but the defendant's evidence made it plain that the plaintiff had a very valuable collection of precious stones, stones that he certainly

put a high value upon. I find that they<sup>1</sup> were of considerable value; how great, I am not deciding now.

The plaintiff alleges in his statement of claim that a notice setting out sec. 4 of the Innkeepers' Act, R.S.O. 1914, ch. 173, was not posted "conspicuously . . . in the office and public rooms and in every bed-room" (sec. 6) of the defendant's hotel at the time the plaintiff's jewels and precious stones were brought by the plaintiff to the hotel.

The evidence as to whether this notice (exhibit 3), or one in the same words, was actually in Sherrill's bedroom at any time during his occupancy of it from the 13th June, 1922, until the time of the stealing, is conflicting, and some of the evidence referring to this is unsatisfactory.

It is agreed that Sherrill was aroused as I have already related. Sherrill says that before he completed dressing he called his solicitor, Alexander Fasken. The conversation was not put in evidence, but, as a result of the conversation, George H. Sedgewick, a then partner of Mr. Fasken, attended (it would appear) promptly at Sherrill's room in the defendant's hotel. He immediately instituted a search for the statutory notice. Sherrill joined in the search, and they failed to find any notice either like exhibit 3 or of any other kind or character. They found no notice. Each of them swears this.

C. L. Campbell, another guest at the hotel, was sworn as a witness. He said he remembered the incident of the notice; that there was painting and re-decorating going on in the rooms. His room was on the 6th or 8th floor, and there was no notice in his (Campbell's) room at the time of the stealing of Sherrill's property.

Sherrill and Campbell discussed the matter. They went to Sherrill's room and found no card up in it. As they came away from the room, he says, they met Mr. Muldoon, the hotel-manager, in the hall. When Campbell and Sherrill, shortly afterwards, came again to the room, they found, they say, the card in place in Sherrill's room.

Muldoon was not called as a witness, nor did he, so far as I have been shewn, attend for examination for discovery. I accept Mr. Sedgewick's statement that the notice was not up when he visited Sherrill's room that morning after the theft. I see no reason why I should not believe in the truthfulness of Campbell. Besides that, Campbell's attention was pointedly called to the matter of the notice being up or being down.

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I was not impressed by the evidence of hotel employés who spoke as though they knew the notice was up, because notices were put in every room. Nor was I impressed with the evidence of employés whose duty it was to inspect and see that notices were in the rooms and who indicate in a general sort of way that the notices were in place, and that the notice in 709, Sherrill's room, was in place.

Besides this class of evidence, which I decline to follow, there is the evidence of the witness Waterhouse, a detective of the Toronto police force, who, pursuant to a call for help put in by the hotel people, came to the hotel before Sherrill had finished dressing that morning, and who with the house-detective made an inspection of the room and examined carefully into the means by which the thief obtained entrance to the room, and as to the articles that had been stolen, and who also questioned Sherrill in the presence of an assistant-manager of the hotel and the hotel-detective.

His evidence is more direct and probative than that of the employés. He says he examined the transom over the door of Sherrill's room to find if the dust had been brushed off by the passing of an intruder over this passage, and that he examined the door for marks made in attempts to force an entrance, and he says that there was a frame with a card in it on the door. He had been often in and about the defendant's hotel, and never saw a room without a notice in it. "I saw Sherrill was there when I went there. Cannot say the card was up then or not." He made no memorandum as to the presence or absence of the notice in the room, and the impression his evidence left upon my mind was that his attention was not directed to the presence or absence of the notice, nor does it seem to me that the importance of the presence or absence of the notice was present to the mind of this witness at the time, now nearly six years ago.

Then the house-detective, William A. Howard, says: "I took notice that the Act was posted up. Muldoon went with me. It was in style like exhibit 3." He says in cross-examination that he left the city-detective taking a report from Sherrill, and that at about that time he and Muldoon concluded that they two had solved the problem.

Upon the whole of the evidence, conflicting as it is, I find that the notice was not up. If I should find otherwise I should be compelled to conclude that Mr. Alexander Fasken, Mr. George H. Sedgewick, and Sherrill have conspired to mislead the Court.



There can be no mistake upon Sedgewick's part that the notice was not there at the time he was in the room.

Another question of fact which was raised upon the evidence is as to whether or not Sherrill had actual notice that there was a vault, a place of safety, of the use of which guests of the hotel might avail themselves. Mr. O'Neil, the general manager, swore that he had, before the date of the theft, more than once called the attention of Mr. Sherrill to the fact that there was such a vault—such a place to put valuables. There is a large body of evidence tending to shew that Sherrill was aware that there was in fact a vault to keep valuables in; and, if he was not aware of it, he ought to have been so at the time he went to the hotel on the 13th June, 1922. Sherrill did not make, on the whole, a very firm denial of this. I find as a fact that Sherrill had actual notice that there was in the hotel a vault for the reception of valuables and for their safe-keeping, and that he knew that upon request he could secure the use thereof.

In making this finding I am not casting any doubt upon Mr. Sherrill's evidence where he swears that he did not notice the printed line appearing at the top of each page of the hotel-register reading: "Guests are hereby notified that the company will not be responsible for valuables, money, jewelry, clothing, etc., unless the same are deposited in the safe."

I accept his statement that he never noticed this line on any occasion when signing or looking at the register of the hotel. His eyesight is not good for noticing such a line, and one's own experience would lead one to accept his statement on this point.

While I find as a fact that Sherrill had actual notice that there was a safe where he might put his valuables, it is not a finding that Sherrill knew what the notice exhibit 3 would have made him know, namely (sec. 4 of the Act):—

"No innkeeper shall be liable to make good to any guest of such innkeeper any loss of or injury to goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than the sum of \$40 *except*:

"(a) where such goods or property have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ;

"(b) Where such goods or property have been deposited expressly for safe custody with such innkeeper."

The other matter of fact that was urged in argument is that the plaintiff himself had by his conduct invited the stealing of

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McEvoy, J. his property. There is no doubt upon the evidence that the plaintiff was proud of his collection and that he took pleasure in shewing specimens to such persons as would be interested in examining them. I am not, however, able to find as a fact that his own conduct, in shewing his specimens on such occasions as according to the evidence he did exhibit them more or less publicly, would be negligence on his part of such a nature and extent as would deprive him of his rights against the innkeeper. There is nothing but inference to indicate that his exhibiting of his valuables had any relation to the theft.

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There is no evidence upon which I am able to find that the plaintiff's loss is attributable to his own acts, or upon which I could find that the loss would not have occurred if the plaintiff had used the ordinary care that a prudent man may be reasonably expected to take under the circumstances. I find as a fact that he did take such care as a prudent man may be reasonably expected to take under the circumstances.

*Armistead v. White* (1851), 20 L.J.N.S. Q.B. 524, is a plain authority for the proposition that a guest at an hotel may lose his right of action for goods lost in an inn by gross negligence on his part. That was a case where a traveller left his money in a box in the "commercial room" in the inn. The box was locked only with a bolt, which could be shoved or slidden on or off the lock without any key. The guest several times counted his money in the presence of strangers. The jury found that he was guilty of "gross negligence" in leaving the box with the money in it, under the circumstances of the case. The Court refused to disturb the verdict.

In *Filipowski v. Merryweather* (1860), 2 F. & F. 285, Erle, C.J., said (p. 287) that the guest would lose his right to recover if he did not do "all that a reasonable man might be reasonably expected to do *under the circumstances*."

And see *Cashill v. Wright* (1856), 6 E. & B. 891, 900. Erle, J., in that case said:—

"We think that the rule of law resulting from all the authorities is that, in a case like the present, the goods remain under the charge of the innkeeper, and the protection of the inn, so as to make the innkeeper *liable as for breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances*."

In *Morgan v. Ravey* (1861), 6 H. & N. 265, Chief Baron Pollock puts the general ground of liability thus, at p. 276:—

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"We think the cases have established that where a relation exists between two parties, which involves the performance of certain duties by one of them and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him."

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That is, to keep the guest's goods safely.

In *Oppenheim v. White Lion Hotel Co. Ltd.* (1871), L.R. 6 C.P. 515, the trial Judge charged the jury "that the question for their consideration was, whether the loss would or would not have happened if the plaintiff had used the ordinary care that a prudent man might reasonably have been expected to have taken under the circumstances." A Court consisting of Willes, J., Keating, J., and Montague Smith, J., held this to be a proper charge.

In *Robins & Co. v. Gray*, [1895] 2 Q.B. 501, at pp. 503 and 504, Lord Esher, M.R., says:—

"The duties, liabilities, and rights of innkeepers with respect to goods brought to inns by guests are founded, not upon bailment, or pledge, or contract, but upon the custom of the realm with regard to innkeepers. Their rights and liabilities are dependent upon that, and that alone; they do not come under any other head of law."

*Butler and Co. Ltd. v. Quilter* (1900), 17 Times L.R. 159, determines that an innkeeper cannot escape his liability safely to keep his guests's goods by shewing that he, the innkeeper, was not negligent.

This principle was upheld in an appellate court in Pennsylvania in *Shultz v. Wall* (1890), 134 Penn. St. 262. I have read this case as well as the New York case *Purvis v. Coleman & Stetson* (1860), 21 N.Y.R. 111.

Here a majority of the Court held that actual notice that there was a safe provided was equivalent to or better than posting the notice as the statute in force then required.

There is another New York case, *Stanton v. Leland* (1855), reported in 4 E. D. Smith (New York Common Pleas) 88.

Notwithstanding the cogency of much of the reasoning in these opinions, I do not think they express the law of this Province.

In order to get the benefit of the Innkeepers' Act under the law of this Province it is required that this notice be posted in

McEvoy, J. a conspicuous place in each bed-room in the hotel. And the  
1929. guest is entitled to read the very words of it.

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I am of opinion that actual knowledge of the fact that there is a vault or safe place to which guests may commit their valuables is not enough to secure for the innkeeper the benefits of the Act.

In *Spice v. Bacon* (1877), 2 Ex. D. 463, the innkeeper sought the protection of the Innkeepers' Act. The Imperial Act in force at the time provided that "no innkeeper shall, after the passing of this Act, be liable to make good to any guest of such innkeeper any loss of, or injury to, goods or property brought to his inn . . . to a greater amount than . . . £30, except in the following cases: that is to say, (1) where such goods or property shall have been stolen, lost, or injured, through the wilful act, default, or neglect of such innkeeper or any servant in his employment." The notice posted omitted the word "act," so that, instead of reading "through the wilful *act*, default, or neglect," it read "through the wilful default or neglect." This "material" though "innocent" omission was held by Lord Cairns, L.C., Cockburn, C.J., and Bramwell, L.J., to deprive the innkeeper of the benefit of the Act.

There is a very erudite judgment of Gorham, Co. C.J., in *Fraser v. McGibbon* (1907), 10 O.W.R. 54, wherein the questions of law raised in this action are considered: see *Macdonell v. Woods* (1914), 32 O.L.R. 283, and the Canadian cases collected in "Law Relating to Innkeepers," by C. C. Ross, at pp. 134 *et seq.*

Upon the facts as found I hold that under the law the defendant is not entitled to the protection of the Innkeepers' Act, the notice not being posted as required by the Act; that there is no negligence shewn on the part of the plaintiff sufficient to deprive him of his remedy against the defendant; and that the defendant is liable to the plaintiff in damages.

Unless the parties can agree as to the value of the goods and money lost by the plaintiff, there will be a reference to the Master to ascertain the amount and report; further directions and costs are reserved until after the Master's report.

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[JEFFREY, J.]

BETTLES V. CANADIAN NATIONAL RAILWAY CO.

1929.

March 1.

*Negligence—Infant on Premises of Railway Company without Permission or Invitation—Child Accompanying Father who Has Business there—Injury by Negligence of Railway Servants—Licensee—Duty Owed to—Liability of Company for Active Negligence of Servants.*

The adult plaintiff, having business with the defendants, drove his motor-truck into their enclosed premises and left it standing therein. His daughter, the infant plaintiff, who had accompanied him, remained seated in the truck. It was struck by a car of the defendants which was pushed over the end of a railway-siding. The collision was caused by a misunderstanding that occurred between the employees operating the train of which the car formed part. The truck was damaged and the infant plaintiff injured:—

*Held*, that the infant plaintiff was not on the premises with the permission or upon the invitation of the defendants.

*Sangster v. T. Eaton Co. Ltd.* (1894), 25 O.R. 78, 'distinguished.

The infant plaintiff, however, was not a trespasser, but a licensee, and the defendants owed a duty to her.

*Burchell v. Hickisson* (1880), 50 L.J.Q.B. 101, followed.

The injuries sustained by the child were not caused by the defendants using the premises in the ordinary course of their business; they were caused by the superadded negligence of the defendants' servants, and there were acts of active negligence on their part. The defendants were therefore liable in damages.

*Gallagher v. Humphries* (1862), 6 L.T.N.S. 684, followed.

AN action brought by William H. Bettles on his own behalf and as next friend of his infant daughter and co-plaintiff, Betty Bettles, to recover damages for injury and loss sustained by the plaintiffs by reason, as alleged, of the negligence of the defendants.

The action was tried by JEFFREY, J., without a jury, at a Toronto sittings.

*C. E. Putman*, for the plaintiffs.

*R. E. Laidlaw*, for the defendants.

March 1. JEFFREY, J.:—The following are the facts:—

The adult plaintiff is an agent for the Toronto Dairymen's Bottle Exchange and is required, upon requests made from time to time by any member of the association, to operate trucks owned and equipped by himself for the purpose of collecting bottles and bottle-cases and other dairy equipment in or about the city of Toronto; and the infant plaintiff is his daughter and is now some six years of age.

On or about the 9th July, 1928, the adult plaintiff was requested by an employee of the defendant company to call for and remove milk bottles from certain premises of the defendants situ-

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ate on the easterly side of a paved road of the defendants, leading westerly and thence northerly from a point on Spadina-avenue, a little north of Fleet-street. These premises are enclosed.

On the aforesaid premises there is a long one-storey brick building flanking the easterly limit of the said road of the defendants. Along the westerly limit of the said road runs a plank sidewalk, and to the west thereof are the track-yards of the defendants, with rows of railway tracks running parallel at right angles to the said road, each track ending immediately to the west of the sidewalk. These track-ends are protected by iron buffers or barriers.

On the morning of the 9th July, 1928, the adult plaintiff, William H. Bettles, accompanied by his daughter, the infant plaintiff, drove to the said premises in a Ford motor-truck. He backed the truck up to the aforesaid building, as instructed by an employée of the defendants, as near as possible to the location of the bottles which he was requested to remove, and loaded them on his truck, leaving the infant plaintiff in the cab of the truck on the right-hand side of the driver's seat.

After he had loaded the truck, and before he had resumed his seat in the cab, the truck was struck by a freight-car which was pushed over the end of the siding. This car was travelling at a high rate of speed as evidenced by the fact that, after damaging the truck, it ran into the building, breaking down the brick walls of the same.

The defendants say that a misunderstanding occurred between the employees operating the train of which the car in question formed part, and that was the cause of the collision between the car and the truck owned by the adult plaintiff.

The result was that the truck was badly damaged and the infant plaintiff seriously injured.

The defendants admit negligence so far as the adult plaintiff is concerned, and have paid into court the sum of \$400 in full satisfaction of the damage to the truck and the goods thereon, and allege that the infant plaintiff was a trespasser on the defendants' premises, and that there was no breach of duty owing by them to her.

The facts are not in dispute.

On the argument I was referred to *Sangster v. T. Eaton Co. Ltd.* (1894), 25 O.R. 78. This case is not of assistance. Armour, C.J., in delivering judgment, says:—

"The mother and child were both in the defendants' store, by the invitation of the defendants, for the purpose of purchasing

garments suitable for each, and were so there for the benefit of the defendants."

That is not this case. The infant plaintiff was not on the premises with the permission of the defendants, nor was there any invitation extended by the defendants.

It was suggested that two of the employees of the defendant company saw the infant plaintiff and did not order her off the premises. These employees were ordinary employees of the company and they were not in authority.

I have, however, come to the conclusion that the infant plaintiff was not a trespasser, that she was at the time of the accident a licensee, and that the defendants owed some duty to her.

I think I am bound by the case of *Burchell v. Hickisson* (1880), 50 L.J.Q.B. 101. This was a case in which an adult was proceeding to a house for the purpose of transacting business. Accompanying her was an infant. There were steps leading up to the entrance of the premises, in which the business was to be transacted, and these steps were protected by a railing. Part of the railing had fallen into disrepair, and, as a result, the infant fell through and was injured. In disposing of the case the Court treated the infant, not as a trespasser, but as a licensee, and the claim for damages was disposed of on that assumption.

*Burchell v. Hickisson* has been discussed in many cases, and was considered and approved in the case of *Latham v. R. Johnson & Nephew Ltd.*, [1913] 1 K.B. 398.

I have now to consider what duty the defendant company owed to the infant plaintiff as a licensee.

That duty is clearly defined in a case of *Gallagher v. Humphrey* (1862), 6 L.T.N.S. 684, where Cockburn, C.J., says:—

"The plaintiff" (a licensee) "is passing along the passage by permission of the defendant, and though he could only enjoy that permission under certain contingencies, yet when injury arises not from any of these contingencies, but from the superadded negligence of the defendant, the defendant is liable for that negligence as much as if he had been upon a public highway."

And in the same case Wightman, J., says:—

"It appears to me that such a permission as is here alleged may be subject to the qualification that the person giving it shall not be liable for injuries to persons using the way arising from the ordinary state of things, or of the ordinary nature of the business carried on; but that is distinguishable from the case of injuries wholly arising from the negligence of that person's servants."

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See also *Perdue v. Canadian Pacific Railway Co.* (1910), 12 Can. Ry. Cas. 216, where Garrow, J.A., says (pp. 221, 222):—

“The duty of the owner of premises to a person in that position” (licensee) “is a very narrow one, speaking somewhat generally practically confined to two classes of things, one that he shall not be exposed to a trap or other concealed danger; the other that the owner shall not be guilty of what may be called acts of active negligence. In other respects the licensee must at his own risk use the premises as he finds them.”

I think that in this case the injuries sustained by the infant plaintiff were not caused by the defendants using the premises in the ordinary nature of their business, nor was it such a danger as might be expected; but that the injuries sustained were caused by the superadded negligence of the defendants’ servants and that there were acts of active negligence on their part. It was not a risk or a danger that one might ordinarily expect. I find that the defendants are liable in damages for negligence of their servants.

There was, as before stated, paid into court the sum of \$400 by the defendants for the damage to the adult plaintiff’s truck. He paid hospital, medical, and other bills incurred by the infant plaintiff amounting to \$385.75. For these bills he was liable and they are not disputed.

The infant plaintiff suffered, according to the physician in attendance, considerably for two or three days, but, fortunately, she has completely recovered, is fully restored and enjoying good health. There is no impairment. There is, however, a long and ugly scar on the right leg extending from the knee down, and it may be, owing to the depth of this scar, that an operation, which has been described by the doctors as a minor one, will have to be performed. This, however, is problematical. The cost of this operation will not exceed \$25, and the period of complete convalescence will not exceed two weeks.

It may be, if the operation is performed, that the parents may deem it proper to send the infant plaintiff to a hospital where she will require nursing. If she is so sent, further expense will be incurred.

I have taken this fact into consideration in assessing the damages of the infant plaintiff at the sum of \$350.

There will be judgment for the infant plaintiff for the sum of \$350, and for the adult plaintiff for the sum of \$785.75, inclusive of the amount paid into court, with costs.



## [APPELLATE DIVISION.]

SANI PRODUCTS CO. LTD. v. LEVINE AND BAZOS.

1929.

March 4.

*Appeal—Division Court—Jurisdiction—Judicature Act, 1913, sec. 27.*

Where a judgment has been given by a Division Court in a case in which it had no jurisdiction, an appeal from the judgment will be entertained.

Since the enactment of sec. 27 of the Judicature Act of 1913, *Teskey v. Neil* (1893), 15 P.R. 244, is not binding.

AN appeal by the defendant Bazos from the judgment of the 10th Division Court of the County of York, in favour of the plaintiffs.

March 4. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

*J. S. Beatty*, for the appellant.

*M. C. Purvis*, for the plaintiffs, respondents.

The only point argued was whether an appeal could be taken to this Court when the Division Court had no jurisdiction.

Judgment was given at the close of the argument.

THE COURT held (ORDE, J.A., *dubitante*) that since the enactment of the Judicature Act of 1913, 3 & 4 Geo. V. ch. 19, sec. 27, the rule laid down in *Teskey v. Neil* (1893), 15 P.R. 244, is not binding; and that an appeal from a Division Court, in a case in which a judgment has been given beyond the jurisdiction of the Division Court, will be considered, although the preferable course is to apply for prohibition. *Sweetland v. Turkish Cigarette Co.* (1899), 80 L.T.R. 472, was referred to.

*Appeal allowed with costs as of a motion for prohibition only.*

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*Executors and Administrators—Conveyance by Administratrix of Deceased Owner of Land during Three-year Period—Reconveyance to her and her Husband as Joint Tenants—Conveyance by them to Bonâ Fide Purchaser for Value after Lapse of Statutory Period Free from Debts of Deceased—Devolution of Estates Act, R.S.O. 1927, ch. 148, sec. 12.*

C., the owner of land, died on the 20th December, 1925, intestate. Letters of administration of his estate were granted to his daugh-

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ter A., who was his sole heiress-at-law and next of kin. On the 17th February, 1926, she, as administratrix, conveyed in fee to R., who, on the same day, conveyed in fee to A. and her husband, as joint tenants. No caution having been registered by A. as administratrix and no certificate of *lis pendens* having been registered by any creditor:—

*Held*, that after the 20th December, 1928, the three-year period during which the estate was vested in A. as administratrix having elapsed, she and her husband were entitled, by the operation of sec. 12 of the Devolution of Estates Act, to convey, to a purchaser in good faith and for valuable consideration, who has no notice of the existence of any claims of creditors, a title free from any liability for the debts of C.

The fact that A., as administratrix, had made a conveyance and had in her own right again acquired an interest in the land, did not subject the land, in the hands of a *bonâ fide* purchaser for value, without notice of debts, to any greater liability than if the conveyance had not been made.

*Re Dennis and Lindsay* (1927), 61 O.L.R. 228, applied.

MOTION by vendors of land, under the Vendors and Purchasers Act, for an order declaring that the objections made by the purchaser to the title were invalid.

February 27. The motion was heard by ORDE, J.A., in the Weekly Court, Toronto.

*C. M. Sinclair*, for the vendors.

*W. E. Summerville*, for the purchaser.

March 5. ORDE, J.A.:—The question raised by this motion ought to have been set at rest by the earlier decisions upon the Devolution of Estates Act, now R.S.O. 1927, ch. 148, but a slight difference in the sequence of events seems to frighten a timid purchaser.

One Criddenton, the owner of the lands in question, died on the 20th December, 1925, intestate. Letters of administration were duly granted to his daughter Alice Lillian Down, who was his sole heiress-at-law and next of kin. On the 17th February, 1926, as administratrix, she conveyed the lands in fee to one Marjorie Roberts, who, on the same day, conveyed them in fee to Alice Lillian Down and her husband Harold Brown, as joint tenants.

No caution has been registered by the administratrix, nor has any certificate of *lis pendens* been registered at the instance of any creditor. So that after the 20th December, 1928, the three-year period during which the estate in the lands was vested in the administratrix having elapsed, sec. 12 of the Devolution of Estates Act came into full operation.

One would have thought that the opinions expressed in *Re Dennis and Lindsay* (1927), 61 O.L.R. 228, and in *Re Allison* (1927), 61 O.L.R. 261, had cleared up any doubts as to the right, after the statutory period had passed, of an heir-at-law or of a devisee to dispose of the lands which had come to him by inheritance or devise, to a *bonâ fide* purchaser for value without notice of any debts of the intestate or testator, free from any statutory charge in respect thereof.

In the *Dennis and Lindsay* case (see p. 229) the widow and the heirs-at-law sold and conveyed certain lands which had belonged to the deceased within the three-year period, and it was objected, after the expiry of the three years, by a purchaser from one to whom the grantee had conveyed the lands, that, as no letters of administration had been taken out, the widow and heirs of the deceased could not make a good title. At p. 229 my brother Middleton says:—

“This, however, would not prevent the conveyance from those beneficially entitled having effect. A perfect title would not be obtained until the expiry of the three years, when the land would vest in the beneficiaries, and the conveyance already made by them would in this way be fed and would give the purchaser a full title to the land.”

It is suggested that the present case differs from the *Dennis and Lindsay* case because the administratrix here conveyed the lands in her character of administratrix, and they were then conveyed to herself in her own right and to her husband jointly, all within the three-year period. I am unable to see any such distinction between the two cases. In the present case the conveyance by the administratrix to Roberts and the subsequent conveyance by her could not affect the liability of the lands for the payment of the testator's debts while the three years were still running, nor thereafter as to the estate of Alice Lillian Down therein, she being the heiress-at-law, by virtue of subsec. 2 of sec. 23 of the present Devolution of Estates Act. and possibly also as to her husband's estate by virtue of subsec. 1 of sec. 25, unless he was a purchaser in good faith and for value and without notice of the claims of any creditors.

But subsec. 1 of sec. 12 expressly vests the lands, at the expiration of the three years, there being no caution registered, not only in the persons beneficially entitled upon the intestacy of the deceased owner but in their assigns. The *Dennis and Lindsay* case makes it clear that the title of one to whom the heirs convey during the three-year period is perfected by the statutory

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vesting which takes place at the end of the period, if no caution has been registered, subject, I think, always to the effect upon the purchaser's title of notice of the existence of any claims of creditors.

I am unable to see how the mere fact that the administratrix here has, in that capacity, made a conveyance, or has in her own right again acquired an interest in the lands, can in any way subject the lands, in the hands of a *bonâ fide* purchaser for value without notice of debts, to any greater or more extended liability for the deceased's debts than if the conveyance had not been made. The statutory vesting in her as administratrix ceased on the 30th December, 1928, and the lands then automatically vested in the only person beneficially entitled, that is, herself, as the sole heiress-at-law, or in her assigns. It is really not necessary to consider the technical effect of the two conveyances by which the estate conveyed by the administratrix to Roberts passed to Alice Lillian Down and her husband. Those two are the only persons in whom the lands are now vested, whether by conveyance or automatically under the Act, or by the combined effect of the conveyances and the Act, and they are now entitled to convey, to a purchaser in good faith and for valuable consideration who has no notice of the existence of any claims of creditors, a title free from any liability for the deceased's debts.

*Order declaring accordingly.*

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[ROSE, J.]

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# CARR V. BANK OF MONTREAL.

March 5.

*Contract—Bank—Transaction with Customer—Innocent Misrepresentations by Manager of Bank as to Financial Condition of Customer—Agreement of Third Person with Bank Induced by Misrepresentations — Damages — Rescission — Statute of Frauds, sec. 7.*

A., the manager of a branch of the defendant bank, allowed M., a customer, to overdraw his account to an amount largely in excess of a credit authorised by the bank's head office. C., another customer, out of friendship for M. and also for A., and at the solicitation of A., drew a cheque in favour of M. or bearer for \$10,000 and delivered it to A. The amount at the credit of C.'s account was not at the time sufficient to meet this cheque, but A. allowed C. to overdraw, taking from him a promissory note at six months for \$7,300 in favour of the bank. M.'s account was credited and C.'s account was charged with \$10,000, and M. gave C. a promissory note for the same sum, prepared by A., payable on demand. M.



was insolvent at the time of the transaction and at the time of the trial of this action, which was brought against the bank by C., who alleged that representations made by A. as to M.'s financial position, upon the faith of which he (C.) entered into the transaction, were false and fraudulent, and claimed repayment of \$2,700 and the return of his promissory note for \$7,300:—

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*Held*, upon the evidence, that A. believed what he told C., and C. therefore could not succeed upon a claim for damages for deceit; but, even if A.'s statements were false to his knowledge, a claim for damages, based on the theory that C. had lost money lent by him to M., must also fail, for in that view the action was one brought whereby to charge the bank upon or by reason of a representation or assurance concerning the credit or dealings of another person (M.) to the intent or purpose that such other person might obtain money or credit thereupon; and sec. 7 of the Statute of Frauds, R.S.O. 1927, ch. 131, was a complete defence, the representations not being in writing.

*Clydesdale Bank v. Paton*, [1896] A.C. 381, and *Banbury v. Bank of Montreal*, [1918] A.C. 626, followed.

*Held*, however, that the real transaction, not disclosed by the documents, was that C., at A.'s request, and as much out of consideration for A., who was in danger of losing his place in the bank by reason of his allowing M. to overdraw, as out of friendship for M., agreed with the bank to take over or guarantee \$10,000 of M.'s indebtedness; and, upon that footing, C.'s case was that he was by A.'s misrepresentations induced to enter into an agreement with the bank.

And C., coming forward before the contract had been completely executed by payment, was entitled to have it rescinded, and his cheque and note returned to him; the Statute of Frauds presenting no bar.

Neither the bank's act in releasing M. nor M.'s act in giving a promissory note to C. deprived C. of his right to claim rescission.

The principle stated in *Clough v. London and North Western Railway Co.* (1871), L.R. 7 Ex. 26, applied.

ACTION to recover from the bank \$2,700 and for the return of a promissory note for \$7,300 made by the plaintiff, in the circumstances mentioned below.

The action was tried before ROSE, J., without a jury, at London.

J. W. G. Winnett, K.C., for the plaintiff.

P. W. Beatty, for the defendants.

March 5. ROSE, J.:—The plaintiff was a customer of the Bank of Montreal at its branch office in Ailsa Craig. Another customer, Mr. A. D. McLean, had by the manager of the branch been allowed to overdraw his account to an amount largely in excess of a credit authorised by the bank's head office. The plaintiff, out of friendship for McLean and the manager of the branch, and, at the solicitation of the latter, drew a cheque in favour of McLean or bearer for \$10,000 and delivered it to the

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manager. The amount at the credit of the plaintiff's account was not at the time sufficient to meet this cheque, but the local manager allowed the plaintiff to overdraw, taking from him a promissory note at six months for \$7,300 in favour of the bank. McLean's account was credited, and the plaintiff's account was charged, with the \$10,000, and McLean gave to the plaintiff a promissory note for the same sum, prepared by the local manager, and payable on demand, with a memorandum endorsed to the effect that the note "covered" certain specified live-stock owned by McLean, which was not to be "encumbered, disposed of, or in any way lessened during the term of" the note without the plaintiff's consent. At a later time the bank took from McLean a chattel mortgage covering *inter alia* the live-stock mentioned in the memorandum. It is admitted that, as between the plaintiff and the bank, the plaintiff's claim to the stock mentioned in the memorandum has priority. But McLean was insolvent at the time of the transaction and is insolvent now, and the plaintiff, if he has to look to him, will probably lose his \$10,000, save so much of it as may come to him from the bank as the proceeds of a sale, under the mortgage, of such of the mortgaged goods as are covered by the memorandum endorsed on the note. (The validity of the mortgage is in question in an action brought against the bank by certain of McLean's creditors.) In these circumstances, the plaintiff sues the bank, alleging that the representations made by the local manager as to McLean's financial position were false and fraudulent and claiming repayment of \$2,700 (the amount by which his credit balance, as it stood before the transaction, was reduced by the charging of the cheque for \$10,000) and the return of his promissory note for \$7,300.

McLean was a shipper of cattle both on his own account and as the representative of an association of breeders. He had been a customer of the bank for some time before Mr. R. B. Allis, who was the manager of the branch at the time of the transactions in question, had assumed his office in 1921. For the purposes of his business he was by the head office of the bank granted a credit of \$13,000. Allis had no authority to allow him to overdraw to more than that amount. From time to time statements of his affairs were prepared in the usual way—information being given by him to Allis, and Allis writing out the statements on printed forms, and McLean signing them. One of these statements, made on the 7th April, 1928, shewed assets exceeding the liabilities by more than \$28,000. Exactly what McLean's financial position was at the time of that statement cannot be ascertained upon the

evidence adduced, but there is no doubt that the statement was untrue: some of the assets were over-valued, and some liabilities were deliberately concealed. McLean says that Allis knew of the falsity of the statement and was joining with him in deceiving the bank's head office. I do not believe him. There is no doubt that if Allis had seen fit to make independent inquiries he could have discovered some of the untruths, and it may be that if he had been as careful of the bank's interests as he ought to have been he would have made those inquiries, but I do not think that at the time when this statement was taken there was a reason for his deceiving, or that he intended to deceive, his superiors.

On the day of the date of the statement McLean's overdraft was \$13,896; which fact appears on the face of the statement. On the 21st April, Allis wrote to the head office of the bank suggesting that McLean's credit ought to be increased to \$18,000. He says, and notwithstanding McLean's denial I believe him, that this was as a result of a conference with McLean as to the amount really required in such a business as McLean was conducting. By this time the overdraft had run up to more than \$19,000, partly because Allis on the 17th April had honoured a cheque for \$5,000 drawn by McLean in favour of stockbrokers—obviously not a disbursement in connexion with the business for which the line of credit had been established. But on the 23rd April the overdraft fell to \$11,000, money having come in from persons to whom McLean had shipped cattle, and, as I have said, I do not think that it was because he had allowed McLean's indebtedness to the bank to exceed the authorised amount that Allis applied to his head office for the additional credit.

On the 25th April, the overdraft was up to \$16,000, and another cheque in favour of brokers was presented—this time one for \$7,500. Allis spoke to McLean, who said that he had sent to his brother for money with which to meet this cheque, and Allis, on the faith of a promise that the money would come at once, honoured the cheque and gave instructions to the ledger-keeper to leave in McLean's account a blank space in which the receipt of the promised money could be entered later on. I suppose there is no doubt that on this occasion Allis was taking measures for the deception of any one who might thereafter examine the books of his office. The honouring, on the 26th, 27th, and 28th April, of other cheques, presumably issued by McLean in the regular course of business, brought the overdraft up to more than \$26,000.

On the 28th April, McLean told Allis that he had made losses

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in speculation and that his affairs were "in a mess." In answer to a question he said that the losses were \$12,000, and that he had issued a cheque to brokers for \$7,000. Allis told him that this cheque would not be honoured. The two then discussed McLean's position, and Allis came to realise, if he had not done so already, that his own position in the bank had become insecure, but he seems still to have had a fatuous belief that McLean could pull through if given time. McLean spoke of borrowing money from some one else so as to reduce his indebtedness to the bank; he said, "I wonder whether Carr has any money; I have borrowed from him before."

After his talk with McLean, Allis sent a messenger to ask the plaintiff to call. When the plaintiff came, Allis told him that McLean had made losses; that he, Allis, would be in trouble with the bank because he had allowed the overdraft to exceed the authorised amount; that McLean's position was as shewn in the statement of the 7th April—the plaintiff did not read the statement, but Allis gave him the result of it—; that time was needed; that he thought that if McLean had \$10,000 his affairs could be straightened out. The plaintiff thinks that Allis also said that payment of a sum of \$12,000 due to McLean from the purchasers of cattle had been delayed. In this I think he is in error. At a later time McLean was saying, falsely, that such a sum was coming, but I do not think that Allis had heard that statement at the time when the plaintiff was being asked for the \$10,000; I think that in the conversations that are of importance in this case \$12,000 was mentioned only as the amount of McLean's losses in speculation.

Amongst the assets shewn in the statement of the 7th April is a sum of \$22,750 "due on live-stock shipped." It is quite probable that on the day of the date of the statement there was some such sum due to McLean. But McLean's deposits between the 7th and 25th April had exceeded the amount mentioned, and it is suggested that Allis must have known therefore that the largest asset shewn in the statement had been dissipated, and that the statement was misleading. I do not think that that is so. Allis knew, I suppose, that the money had come in and had gone out; but it would have been natural for him to suppose that what had gone out (except the \$12,500 paid to brokers) had been used in the purchase of live-stock, some or all of which had been shipped; and that, while a statement of affairs made up as of the date of the conversations with the plaintiff would differ in detail from the statement of the 7th April, still the two statements



(apart from the effect of the losses in speculation) would be substantially the same in result. I do not think that Allis supposed that the state of affairs differed substantially from the state disclosed in the statement of the 7th April, except of course for the losses in speculation. I think that Allis believed what he told the plaintiff about McLean's position and prospects. I think also that the statements that he made as to McLean's assets and liabilities were made as statements of fact and not as statements of his belief or opinion.

The plaintiff did not at the time of his first conversation with Allis agree to come to McLean's assistance; he said that the sum required was large and that he would have to take time for consideration. But on the next day he called upon Allis, announced his decision, and signed the cheque for \$10,000. At this time McLean was not in Ailsa Craig, but upon his return he was told by Allis that the cheque had been given. McLean and Allis then went to see the plaintiff; there was a further discussion of McLean's affairs; and then McLean went to the bank and signed the note (prepared, as has been stated, by Allis) in favour of the plaintiff, and at the same time—or it may have been on the occasion of the signing of the cheque for \$10,000—the plaintiff signed a promissory note for \$7,300 in favour of the bank.

The witnesses' recollection of the order in which Allis made his several statements of fact are not identical, and it may be that some of the representations that I have said were made at the bank on the occasion of the plaintiff's first visit to Allis were really made during the course of one of the later conversations. That, however, is a matter of no moment; the representations, whether made at the bank when the plaintiff and Allis were alone, and repeated in the presence of McLean, or made for the first time in McLean's presence, were substantially those that have been mentioned, and, as has been said, I think that Allis believed them to be true.

The relief claimed in the statement of claim is, as has been mentioned, judgment for the repayment of \$2,700 and for the return of the promissory note. This claim for relief follows upon allegations of fraudulent representations by Allis as to McLean's position; and in the course of his argument at the trial counsel for the plaintiff, suggesting that the fraud had been established, contended that the plaintiff was entitled to the relief claimed, as damages for the fraud; but alternatively he put forward a claim for rescission, which, in effect, is the claim set up by the statement of claim, although the word *rescission* is not used by the pleader.

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If I am right in thinking that Allis believed what he told the plaintiff, that, of course, is the end of any claim as for damages for deceit, and if I am wrong—if Allis's statements were false to his knowledge—still the claim for damages, in the form in which I understood it to be presented, must fail. The suggestion, as I understood it, was, that the plaintiff might be treated as having sustained damage, in that he had lost money lent by him to McLean. But, the claim being so stated, the action is one brought whereby to charge the defendants upon or by reason of a representation or assurance made or given concerning or relating to the credit or dealings of another person (McLean) to the intent or purpose that such other person might obtain money or credit thereupon; and sec. 7 of the Statute of Frauds, R.S.O. 1927, ch. 131, is a complete defence: *Clydesdale Bank v. Paton*, [1896] A.C. 381; *Banbury v. Bank of Montreal*, [1918] A.C. 626, 711-714. Therefore, if the plaintiff is entitled to relief, his case must be, not that he was by Allis's representations led to lend money to McLean, but that he was by Allis's misrepresentations induced to enter into an agreement with the defendants.

The plaintiff was brought into the transaction in consequence of McLean's suggestion to Allis that the plaintiff might be willing to lend money to McLean; and in form the transaction was a loan of \$7,300 by the bank to the plaintiff, a loan of \$10,000 by the plaintiff to McLean, and a payment of \$10,000 by McLean to the bank. But after much consideration of the evidence I have come to the conclusion that the real nature of the transaction is not disclosed by the documents—all of which were prepared by Allis in such form as suited his purpose, which was to reduce McLean's apparent liability to the bank. The real transaction seems to me to have been this: The plaintiff, at Allis's request, and as much out of consideration for Allis as out of friendship for McLean, agreed with the bank to take over—or, as he perhaps understood the transaction, to guarantee—\$10,000 of McLean's indebtedness. But the plaintiff could not at the moment put up as much as \$10,000, and it was agreed that he should put up what he could and should be given time for the balance. Accordingly he issued a cheque for \$10,000 payable to McLean or bearer and delivered it to the bank—not, it is to be remembered, to McLean, who was away from home on the day, the 30th April, on which, according to the bank's stamp, the cheque was accepted—and in due course thereafter he gave to the bank his promissory note for \$7,300, the bank crediting his account with \$7,300 and charging it with the \$10,000. And McLean, ratifying the transaction and

to establish the fact that he was bound to indemnify the plaintiff, gave to the plaintiff a promissory note for \$10,000. The plaintiff thinks that, in the course of the first conversation that he had with Allis, something was said about getting security from McLean; but the transaction as between the plaintiff and the bank seems to have been complete as soon as the plaintiff had signed the cheque and delivered it to Allis, and the subsequent taking of the note does not seem to change the transaction from an assumption of McLean's liability to the bank into a loan to McLean.

If the foregoing is a correct statement of the transaction, there seems to be no difficulty in the way of granting relief; the case is not one in which the plaintiff seeks damages for having been induced to lend money to McLean; it is one in which he seeks to set aside an agreement with the bank induced by misrepresentations made by the person who negotiated it on the bank's behalf, and to be restored to the position in which he was before he had assented to the bank's proposal; and he comes forward before the contract has been completely executed by payment, indeed before the maturity of the promissory note for \$7,300.

To the claim now under discussion the Statute of Frauds presents no bar. The false representation, it is true, was made concerning McLean's credit; but it was not made to the intent that McLean might obtain money or credit upon it; it was made to the intent that the plaintiff should agree with the bank to pay money to the bank; and the fact that the plaintiff was to look to McLean for reimbursement was only incidental. Moreover, as I understand Lord Wrenbury's statement in *Banbury v. Bank of Montreal*, [1918] A.C. 626, the statute would not preclude the plaintiff from putting forward the innocent misrepresentation as a ground for rescission, even if the representation had been made to the intent specified in the statute.

Again, it is my opinion that the fact that the bank credited McLean's account with the \$10,000 does not stand in the plaintiff's way. The bank, upon making such entries in the plaintiff's account as are necessary to reverse the entries made in connection with the transaction now under review, and upon returning to the plaintiff his cheque and promissory note, may or may not be able, by suitable entries in McLean's account, to revoke the credit of \$10,000 given to him; that is something upon which no pronouncement ought to be made in an action to which McLean is not a party. But, even if the bank cannot revert to its former right as against McLean, that is no reason why the plaintiff should not be restored to his former position. The

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Court refuses sometimes to order rescission when to order it would be prejudicially to affect rights which a third person has acquired under the contract: *Clough v. London and North Western Railway Co.* (1871), L.R. 7 Ex. 26; Morrison, *The Principles of Rescission of Contract*, p. 194 *et seq.*; Halsbury's *Laws of England*, vol. 20, p. 751. But it was the act of the bank in crediting McLean's account with the amount of the plaintiff's cheque, not an act done by McLean in reliance upon the validity of the agreement between the plaintiff and the bank, that altered McLean's position; and if, as between McLean and the bank, the bank's act is irrevocable, McLean will gain rather than lose by the rescission; and, if the bank is free to revoke the credit given to McLean, he will simply be where he was before; and, although he will owe \$10,000 to the bank instead of to the plaintiff, he will owe no more than he does now. McLean's position is not like that of an innocent third party who has acquired an interest in the property, and, in my opinion, neither the bank's act in releasing him nor his act in giving a promissory note to the plaintiff deprives the plaintiff, on the principle stated in *Clough v. London and North Western Railway Co.* and applied in later cases, of his right to claim rescission.

For these reasons, I think that there must be judgment declaring the plaintiff's right to have his account with the bank corrected by the deletion of the charge of \$10,000 and the credit of \$7,300, ordering the bank to return to the plaintiff his cheque for \$10,000 and his promissory note for \$7,300, and ordering the plaintiff to endorse over to the defendants, without recourse (and for what it may be worth), McLean's promissory note for \$10,000. The charges of fraud being, as I think, unfounded—and indeed not very firmly believed in by the plaintiff—there will be no order as to costs.

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PELLATT & PELLATT LTD. v. McLEAN AND BANK OF MONTREAL.

*Assignments and Preferences—Mortgages Made by Insolvent—Concurrent Intent to Prefer—Presumption—Assignments and Preferences Act, R.S.O. 1927, ch. 162, sec. 4 (2) (3)—Rebuttal—Evidence—Pressure.*

Mr., at a time when he was in insolvent circumstances, mortgaged to a bank all of his real property and all of his chattels; the mortgages, if valid, had the effect of giving the bank a preference over



his other creditors; this action, to have them declared void against the plaintiffs and all other creditors of M., was brought within 60 days after they had been executed; and it was *held*, upon the evidence, that the statutory presumption declared by sec. 4 (3) of the Assignments and Preferences Act had not been rebutted.

The statutory presumption of intent to prefer cannot be rebutted by proof that the debtor had no desire to prefer but simply yielded to the pressure applied by the creditor.

*Clifton v. Towers* (1917), 39 O.L.R. 292, followed.

Concurrence of the wrongful intent was essential to the success of the plaintiffs' case; and, upon the evidence, A., the representative of the bank, and through him the bank, must be deemed to have had knowledge that M. was in insolvent circumstances and unable to pay his debts in full, within the meaning of sec. 4 (2) of the Act. The information that A. had went far beyond that knowledge of the debtor's embarrassed circumstances which in *Re Webb* (1921), 51 O.L.R. 5, was held not to amount to knowledge of insolvency.

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AN action brought by judgment creditors of the defendant A. W. McLean to have it declared that mortgages of land and of chattels given by McLean to the defendant the Bank of Montreal on the 12th May, 1928, were void as against McLean's creditors.

The action was tried before ROSE, J., without a jury, at London.

*R. B. Gibson*, for the plaintiffs.

*P. W. Beatty*, for the defendant bank.

No one appeared for the defendant McLean, as against whom the pleadings had been noted closed.

March 5. ROSE, J.:—The mortgages covered all of the mortgagor's real property and all of his "chattels of every kind and description" wherever situate; they were made at a time when McLean was in insolvent circumstances; if valid they have the effect of giving the bank a preference over McLean's other creditors; the action to impeach them was brought within 60 days after they had been executed; and the question is whether the presumption declared by sec. 4(3) of the Assignments and Preferences Act, R.S.O. 1927, ch. 162, has been rebutted.

McLean was a dealer in and shipper of cattle and other live-stock. He had an account with the defendant bank at its branch office at Ailsa Craig, and had been granted a line of credit of \$13,000. The manager of the branch, Mr. Allis, had, without authority, allowed him to overdraw to an amount considerably in excess of the authorised credit; and at the end of April and the beginning of May, 1928, the steps described in my judgment in *Carr v. Bank of Montreal*, *ante*, had been taken for the reduction of the overdraft. On the 10th May, a cheque for \$5,000 drawn

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by McLean in favour of the plaintiffs in this action was presented for payment, and Allis went to see McLean. McLean was in a state of great distress of mind; he described himself as "broke," and said that he had that morning attempted suicide. Allis tried to calm him and to get from him some precise information as to the state of his affairs; the result being that McLean said finally that he would be all right if he could find a means of taking care of the plaintiffs' claim and of the claim of another firm of brokers, Messrs. Jones, Easton, & McCallum, of London. He also told of messages that he had sent to a brother-in-law and a cousin asking them to come to his assistance. On the next day, the 11th, Allis and McLean went to London to see McLean's cousin, who had agreed to meet him there. The cousin expressed himself as being unable to help. Then Allis and McLean went to the office of Messrs. Jones, Easton, & McCallum and had an interview with Mr. Easton, to whom McLean said that his affairs were involved, that he had no ready assets, but that he could pay Messrs. Jones & Co. if they would accept payment in instalments spread over three months. Mr. Easton agreed to wait, and McLean gave him promissory notes, one at 15 days for \$2,000, one at one month for \$1,000, one at two months for \$1,000, and one at three months for \$1,416.10—in all \$5,416.10. Mr. Easton seems to think that Allis believed that McLean would be able to meet these notes at maturity.

McLean's mother held mortgages on some of his lands to secure payment of some \$7,000. On or about the 10th May, Allis went to her to ask her to postpone her mortgages—apparently for the benefit of Carr. She refused. On the 11th, after Allis and McLean had returned from London, McLean called upon his mother and reported to Allis that she would not help.

On the morning of the 12th May, McLean told Allis on the telephone (and later in the day he repeated the statement, as will be mentioned) that a delayed payment of \$12,000 for cattle shipped was coming from Montreal. Allis expressed astonishment; but McLean said that the books (of the shippers or of the purchasers) had been examined, and that there was no doubt about the fact. Early on the same morning, the 12th May, a cheque for \$3,860.41 drawn by McLean in favour of Messrs. Moffatt & Woods, presumably to pay for cattle, was presented for payment.

About noon on the 12th May, Allis sent for the bank's local solicitor, who came early in the afternoon bringing with him blank forms of mortgages which he proceeded to complete by

filling in such particulars as Allis could furnish. McLean came to the bank's office and was asked to execute the mortgages. At first he refused. He said he had made losses in speculation, but was solvent; that a substantial sum was coming from commission houses (the \$12,000 already referred to) which would be quite sufficient to cover his outstanding cheques; that Mr. Neil McLaughlin was going to guarantee his account with the bank to enable him to continue in business; that everything would be satisfactorily arranged; that publication of the fact that he had executed a chattel mortgage would destroy his credit; that he had promised Mr. Carr not to dispose of cattle during the currency of the note held by Carr. The solicitor said that if the mortgages were not executed a writ would be issued forthwith; and Allis added that the promise to Carr would be worthless in case McLean's assets were sold under a writ of execution. Thereupon McLean executed the mortgages. The chattel mortgage was taken away by the solicitor; the land mortgage was left so that Mrs. McLean might execute it—as she did in due course—to bar her dower.

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Mr. Neil McLaughlin has been mentioned. On the 11th May, he was visited by McLean, who said that he was in difficulty, that he had sustained losses in speculation, that he had been doing well in his business, having made a profit of \$8,000 in the preceding year, that he would be glad if Mr. McLaughlin would assist him so that he might carry on. Mr. McLaughlin agreed to meet him on the next morning at the bank, but McLean did not keep the appointment, and the meeting did not take place until some time in the evening of the 12th, after the mortgages had been executed. At this evening meeting McLean told Mr. McLaughlin about the \$12,000 that was to come from Montreal, and under cross-examination by Mr. McLaughlin adhered to his story and gave particulars of the transaction. Mr. McLaughlin knew about the giving of the mortgages, and was told about the transaction with Carr; but nevertheless he finally expressed himself as willing, upon McLean's promise not to speculate, to guarantee the account with the bank to the extent of \$12,000 or \$13,000; the idea apparently being that, if security for a substantial part of the existing liability to the bank were given, the bank's head office would, on Allis's recommendation, grant a new line of credit, and that with a continued credit McLean could carry on, and out of the profits of his business pay all his debts. The guarantee was not in fact taken; the reason being, apparently, that McLean, feeling that there was no certainty that the bank would allow

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	Allis had not before taking the mortgages procured from McLean any formal statement of affairs later than the statement of the 7th April, referred to in the <i>Carr</i> case, <i>ante</i> , which statement appeared to shew a surplus of \$28,611. He knew however of the following items of indebtedness:—
	An overdraft of .....\$16,181.18
	The note to Carr ..... 10,000.00
	The notes to Jones & Co. .... 5,416.10
	The cheque to Pellatt & Pellatt ..... 5,000.00
	The cheque to Moffatt & Woods ..... 3,860.41
	A liability to a farmers' coöperative society (which has not been mentioned in my narrative) . . . . . 2,000.00

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\$42,457.69;

that is to say, he had positive knowledge of an indebtedness exceeding by \$23,062.69 the liabilities (\$19,395) shewn in the April statement. He knew also that, whereas the April statement had shewn accounts receivable of \$22,750, McLean was not now asserting that any sum in excess of \$12,000 was due him in respect of cattle sold; so that he knew that a reduction of \$10,750 had to be made in the April valuation of the liquid assets. As against that, his information as to the value of the cattle, fodder, and other chattels on hand was that it exceeded by about \$3,100 the value attributed to the corresponding item in April; the net result of these changes being that the apparent surplus had been wiped out and that there was now a deficit of \$2,101.69.

The foregoing is a statement of the most favourable opinion of McLean's affairs that could have been held by Allis if he had stopped to make any calculation at all. But in fact if, in discharge of his duty to the bank, he had made certain inquiries he would have known that a further deduction was to be made from the sum in the April statement set down as the value of the assets. In that April statement there was a list of the lands owned by McLean, with a note of the incumbrances upon the several parcels, the supposed equities being valued and included in the list of assets. Allis had caused a search to be made in the registry office and had learned that no discharge had been registered of a mortgage which he had had reason to believe had been paid off, and also, as I understand the evidence, that a mortgage of which he had not had knowledge stood registered against some



of the lands; but he had not as yet asked the holders of these mortgages for information as to the state of the mortgage accounts. Had he done so he would have learned that the mortgage which he had supposed to be paid off still stood as security for a liability of \$6,000 or more; and he would have had certain knowledge that, on the footing of the April statement, corrected in the particulars that have been mentioned, McLean's liabilities exceeded his assets by not less than \$8,101.29. In fact the deficit was much more than this sum, as appeared when McLean gave particulars a few days later to officials at the head office of the bank; but it does not seem to be probable that on the 12th May Allis by any ordinary inquiry could have ascertained the true state of McLean's affairs.

I do not think it can be said that McLean had any real belief that by giving the mortgages he would procure such an extension of time as would enable him to carry on his business and out of his profits pay all his creditors. Treating Carr, rather than the bank, as the creditor in respect of the \$10,000, McLean knew that he had current liabilities to persons other than the bank of more than \$22,000, and that some of these obligations, especially the claims of the plaintiffs and of Messrs. Moffatt & Woods, required immediate attention, that the note in favour of Carr was payable on demand, that \$2,000 would be due to Messrs. Jones, Easton, & McCallum in a fortnight, and that all of the notes held by them would mature in less than three months. He had said that the profits from his business, in a year in which he had been successful, had been \$8,000; he cannot have thought that out of the profits from his business he could in any reasonable time pay his debts. Moreover, he had no assurance that he would really gain time by executing the mortgages. I think that he believed that if he did not yield to the demands of Allis and the bank's solicitors the crash would be immediate, and that he decided to give the securities in the vague hope that if he did so some means of escape from the position in which he found himself might be discovered, and that in any event he would be in no worse position than that in which he was at the moment.

But, as I understand the judgment of the Appellate Division in *Clifton v. Towers* (1917), 39 O.L.R. 292, the law is that the statutory presumption of *intent* to prefer cannot be rebutted by proof that the debtor had no desire to prefer but simply yielded to the pressure applied by the creditor. The Court seems definitely to have adopted the construction of the words "whether the same be made voluntarily or under pressure" suggested by

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Moss, J.A., in *Webster v. Crickmore* (1898), 25 A.R. 97, at p. 102, soon after their introduction by R.S.O. 1897, ch. 147, sec. 2(4), and to have rejected the opposed reading suggested by Burton, C.J.O., who thought that the presumption might be rebutted by "clear and conclusive evidence that it was by reason of the pressure that the transfer was made" (p. 105). The view of Moss, J.A., was that "in seeking to displace the intent and to negative unjust preference in a transaction coming within the conditions of these subsections" (i.e. the relevant subsections of sec. 4 of the present Act) "pressure is to be left out as a factor;" and Hodgins, J.A., reading the judgment of the Court in *Clifton v. Towers*, said (39 O.L.R. at p. 299): "If the presumption arises in the first instance, notwithstanding proof of pressure, it is needless to say that pressure continues to be immaterial throughout."

Although the presumption that McLean intended to give to the bank an unjust preference over his other creditors has not been rebutted, it is necessary to consider the state of mind of the bank's representative, Allis; for concurrence of the wrongful intent is essential to the success of the plaintiffs' case. Now Allis, as has been stated, knew of current debts, including the overdraft, amounting to \$42,457.69. He knew also as well as McLean did that the claims of Messrs. Jones, Easton, & McCallum, Pellatt & Pellatt, and Moffatt & Woods, amounting together to \$14,276.51, were urgent; and he knew that the bank's head office was not aware of the true state of affairs; and so if he entertained a hope that, upon being informed that security for part of McLean's indebtedness to the bank had been obtained from Mr. McLaughlin and that McLean himself had given the mortgages, the head office would authorise a continuance of the line of credit, it was a hope only and not an expectation based upon anything that had been said to him by his superiors. It is difficult to say exactly what it was that moved him, but my impression is that his main object was as far as possible to protect himself by protecting the bank and perhaps Carr, and that, while he had some hope that he might be able to persuade the head office to continue to give credit to McLean, his concern for McLean was by no means the dominating motive. But, even if Allis did really hope to secure time for McLean, the hope, as has been said, was not based on any information that had come from the bank's head office. Moreover, it seems to be reasonably clear that if Allis had stopped to consider the effect of the facts that he had learned he would have known that McLean's account with the bank would have to be

closed. The only thing that tells against this view is the fact that Mr. McLaughlin, with knowledge that Carr had put up \$10,000, that the mortgages had been given, and that McLean had lost money in speculation, was ready to guarantee a large part of McLean's indebtedness to the bank. McLean—or McLean and Allis—seem to have made McLaughlin believe that the situation could be saved; McLaughlin was quite as capable as Allis of forming a correct opinion; and, if he had had all the information that Allis had, the fact that he decided to guarantee a portion of the account would have gone far to support an inference that Allis believed that an extension could be obtained, and that with the extension McLean could pull through. But McLaughlin does not seem to have known all that Allis knew about the current liabilities or about the deductions that had to be made from the amounts in the April statement set down as the value of the assets, and I do not think that if he had had all of Allis's information he would have been willing to give the guarantee; and so I do not think that the fact that he was willing to give it is of any very great importance. Allis, even if he did not believe that McLean was insolvent, in the sense that the assets, if realised, would be insufficient for the payment of the creditors, still had knowledge from which, as I think, ordinary men of business would have concluded that there was the deficiency; and certainly Allis knew that McLean was in no position to pay his current liabilities without a sale of the assets mortgaged to the bank, even if the bank could be prevailed upon to continue to allow him to overdraw for the purposes of his regular business. And so Allis, and through him the bank, must be deemed to have had knowledge that McLean was in insolvent circumstances and unable to pay his debts in full, within the meaning of sec. 4(2) of the Assignments and Preferences Act: see *National Bank of Australasia v. Morris*, [1892] A.C. 287, 290. The information that Allis had went far beyond that knowledge of the debtor's embarrassed circumstances which in *Re Webb* (1921), 51 O.L.R. 5, cited by Mr. Beatty, was held not to amount to knowledge of his insolvency.

I cannot find that either Allis or McLean had anything like a confident belief that by giving the mortgages McLean would put himself in a position in which he could continue his business and pay his debts. The case, therefore, in my opinion, cannot be brought within *Burns v. Royal Bank of Canada* (1922), 51 O.L.R. 564, *Burns v. Graham* (1922), 53 O.L.R. 226, *Re Buchanan* (1922), 23 O.W.N. 392, [1923] 1 D.L.R. 391, and other cases in which a transaction entered into in such a belief has been sup-

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ported. In my opinion the presumption has not been rebutted—it is not established that either McLean or Allis acted without the intent mentioned in the statute—and the action must succeed.

*Judgment for the plaintiffs.*

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CHILDREN'S AID SOCIETY OF FRONTENAC V. TOWN OF  
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March 12.

*Infants—Maintenance of Deserted Children—Police Magistrate's Order Committing Infants to Care of Children's Aid Society—Payments for Maintenance Directed to be Made by Counties Corporation—Amendment of Order by Substituting Town Corporation—Jurisdiction of Magistrate—Effect of Repeal of Statute—Children's Protection Acts and Interpretation Act.*

Under an order of the Police Magistrate for the County of Frontenac, made in January, 1927, by virtue of the Children's Protection Act of Ontario, R.S.O. 1914, ch. 231, and amendments, two infants were delivered into the custody of the plaintiff society and thus became its wards. The order directed that the Corporation of the United Counties of Leeds and Grenville should pay a weekly sum to the society for the maintenance of the infants. It was afterwards discovered that the Town of Gananoque, of which the infants were residents, was a separate municipality, so constituted by Act of the Ontario Legislature in 1922; and on the 19th May, 1927, upon the application of the society, the magistrate amended his order by directing that the maintenance-money should be paid by the town corporation instead of the counties corporation. The town corporation repudiated its liability, and this action was brought to enforce payment:—

*Held*, that the magistrate had jurisdiction to make the first order: R.S.O. 1914, ch. 231, sec. 2, subsec. 1(e), 9, subsecs. 5 and 6, and 12. That Act and the Children's Protection Act of 1922, 12 & 13 Geo. V. ch. 92, were both repealed by sec. 39 of the Children's Protection Act, 1927, 17 Geo. V. ch. 78, which came into force on the 5th April, 1927:—

*Held*, that, the magistrate not having, on or before the 19th May, 1927, been designated a "judge," within the meaning of the Act of 1927, had no jurisdiction to make the amending order.

Section 14 (b) of the Interpretation Act, R.S.O. 1927, ch. 1, has the effect of making the procedure under the new or repealing Act that to be adopted, and therefore the application to amend should have been dealt with by an official duly authorised under the Act of 1927. *Regina v. Inhabitants of Mawgan* (1838), 8 A. & E. 496, and *Regina v. Inhabitants of Denton* (1852), 18 Q.B. 761, referred to.

AN action brought by the society against the Corporation of the Town of Gananoque to recover the cost of maintaining two infant children.



The action was tried before WRIGHT, J., without a jury, at Kingston. 1929.

*W. H. Herrington*, for the plaintiff society.

*A. B. Cunningham*, K.C., for the defendant corporation.

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March 12. WRIGHT, J.:—The plaintiff sues the defendant for the maintenance of Earl Duncan Grant and Murray Grant, two children who were, by an order made on the 11th day of January, 1927, by J. W. Bradshaw, Esquire, Police Magistrate for the County of Frontenac, ordered to be delivered into the custody of the plaintiff society, thus constituting the said children wards of the society.

By the said order, as originally made, it was directed that the Corporation of the United Counties of Leeds and Grenville should pay the sum of \$5.25 per week towards the maintenance of each of the said children.

The application and order were made under the provisions of the Children's Protection Act of Ontario, R.S.O. 1914, ch. 231, and amendments thereto. The substantial amendments to this Act were made by the Children's Protection Act, 1922, 12 & 13 Geo. V. ch 92.

It was subsequently discovered that the Town of Gananoque was a separate municipality, within the meaning of the Act referred to, having been constituted a separate municipality by a special Act of the Ontario Legislature, 12 & 13 Geo. V. ch. 112, and therefore, as it was alleged, the children were residents of the Town of Gananoque, and the order should not have been made against the Corporation of the United Counties of Leeds and Grenville.

When the latter municipality received a copy of the order already referred to, the clerk of the said municipality took exception to it and so notified the Police Magistrate and the Rev. W. Black, inspector for the plaintiff society.

The solicitor for the plaintiff society made application to Mr. Bradshaw, the Police Magistrate, to have the order amended so as to make the proper municipality liable, but further than such application nothing appears to have been done until the 19th day of May, 1927, when the Police Magistrate amended his order and directed that the maintenance should be paid by the Corporation of the Town of Gananoque instead of by the Corporation of the United Counties of Leeds and Grenville. The town corporation repudiated liability, and this action is brought to enforce the claim.

Wright, J. Several defences were set up, among them being the following: (1) That, as the Corporation of the United Counties of Leeds and Grenville took no active steps to set aside the original order within the time prescribed by sec. 12 of the Children's Protection Act, 1922, the order became absolute, and that municipality alone is liable for the maintenance of the children. This provision is continued by subsec. 7 of sec. 11 of the Children's Protection Act of 1927, 17 Geo. V. ch. 78.

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The chief defence relied on by the defendant corporation is that on the 19th May, 1927, when Police Magistrate Bradshaw purported or attempted to amend the original order by declaring that the defendant municipality is liable for the maintenance of the children mentioned, he had no jurisdiction to do so and the order is therefore a nullity.

As Police Magistrate for the County of Frontenac he had jurisdiction to make the order of the 11th January. See R.S.O. 1914, ch. 231, sec. 2, subsec. 1(e); also sec. 9, subsecs. 5 and 6, and sec. 12 of the same Act.

The Children's Protection Act of Ontario, R.S.O. 1914, ch. 231, and the Children's Protection Act, 1922, were both repealed in entirety by the Children's Protection Act, 1927, sec. 39, which came into force on the 5th April, 1927.

By an order in council passed on the 26th day of May, 1927, the Police Magistrate, Mr. Bradshaw, was designated a "judge," within the meaning of the Children's Protection Act of 1927. As already stated, the defendant corporation contends that, when the amending order was made on the 19th May, 1927, the Police Magistrate had no jurisdiction over the case whatever, as he was not at that date a Police Magistrate designated by the Lieutenant-Governor in Council.

For the plaintiff society it is contended that, the application having been made to the Police Magistrate at a time when he had jurisdiction, he retained that jurisdiction, which included a jurisdiction to amend any order made by him until he exercised the power of amendment. In support of this contention the Interpretation Act, R.S.O. 1927, ch. 1, secs. 13 and 14, is relied on. No substantial change has been made by the Revised Statutes of 1927 so far as material to this action except that in 1914 the numbers of the pertinent sections were 14, 15, and 16, whereas in the present Act they are 13, 14, and 15, and for greater convenience the references will be to the latter Act.

Section 14(a) is relied upon as conferring express authority on the Police Magistrate to make the order of the 19th May. I

do not think that the order can be supported by virtue of the provisions of that subsection. The Police Magistrate does not come within the designation of "all officers and persons acting under the Act." These words, I think, refer to executive rather than judicial officers.

I think sec. 14(b) is the controlling clause, and it provides that proceedings shall be taken up and continued under and in conformity with the provisions of the substituted Act, so far as consistently may be.

This has the effect of making the procedure under the new or repealing Act that to be adopted, and therefore the application to amend should have been dealt with by an official duly authorised under the Children's Protection Act of 1927.

The decision in *Regina v. Inhabitants of Mawgan* (1838), 8 A. & E. 496, is, I think, helpful in a consideration of this case. That case is authority for the proposition that when jurisdiction is taken away by a repealing statute no jurisdiction exists even to continue proceedings commenced under the repealed Act unless there is something in the repealing Act providing for a continuance of jurisdiction.

That case was followed in *Regina v. Inhabitants of Denton* (1852), 18 Q.B. 761, where, at p. 770, Lord Campbell, C.J., in discussing the matter, says: "I think the effect of a repeal is the same whether the alteration affect procedure only or matter which is more of substance." Coleridge, J., at p. 771, says: "The proceedings are before the Court, and are at a stage when the question arises whether a particular step can be justified. It can be justified only by an Act of Parliament; and that Act is repealed without any saving. Then, can the Court for the present purpose take note of the repealed Act? The answer is that what has been done and perfected cannot be disturbed; but if you want assistance from the statute for a further purpose, as that of giving judgment, you cannot now have it."

The case of *Regina v. Inhabitants of Mawgan* was referred to with approval by Mr. Justice Logie in *City of St. Catharines v. Hydro-Electric Power Commission of Ontario* (1927), 61 O.L.R. 465—see pp. 475 and 476.

I am of opinion therefore that the procedure to be followed after the Act of 1927 came in force was that indicated therein, and that the only officials who had jurisdiction to act in any matter, whether the right or liability accrued before or after the passing of that Act, were those designated therein. Therefore in the present instance the only Police Magistrate authorised to

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Wright, J. act in the premises was one designated by the Lieutenant-Governor  
 1929. in Council. When the order was made on the 19th May, 1927,  
 Mr. Bradshaw, the Police Magistrate, had not been so designated,  
 CHILDREN'S and therefore had no jurisdiction to make the order either as  
 AID a substantive or amending order.  
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OF In pursuance of this view it follows that the action fails and  
 FRONTENAC must be dismissed, but under the circumstances without costs.  
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JARVIS V. INTERNATIONAL NICKEL CO. LTD.

March 13. *Physicians and Surgeons—Patient in Hospital—Allegation of Negligent and Unskillful Treatment—Action against Owners of Hospital and Medical Superintendent—Duty of Owners of Hospital—Selection of Medical Staff—Duty of Physician to Patient—Exercise of Reasonable Care and Average Skill—Whether Duty to Call in Specialist when Unable to Diagnose Disease—Delay in Operation—Dismissal of Action—Costs.*

The plaintiff, who was an employee of the defendant company, brought this action against the company upon a contract whereby it agreed to furnish him with medical and surgical treatment in case of illness, in consideration of moneys deducted from time to time from his monthly salary. Falling ill, he was treated in the company's hospital by physicians and surgeons employed by the company. He asserted breach of the contract, in that he had not been skillfully and properly treated while a patient in the hospital:—

*Held*, that the company, having exercised due care and skill in selecting its medical staff, had done all that it undertook to do, and was not to be regarded as warranting that in all details of treatment the physicians and surgeons selected would exercise reasonable care and skill; and the action as against the company was dismissed.

*Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820, and *Evans v. Liverpool Corporation*, [1906] 1 K.B. 160, applied.

Against M., the medical superintendent in charge of the hospital, damages were also sought for his alleged negligent treatment of the plaintiff while a patient in the hospital. The evidence shewed that M. failed to diagnose the ear-trouble from which the plaintiff was suffering as mastoiditis — which it turned out to be — and, although he (M.) was not able to ascertain what the exact trouble was, he did not send for nor advise sending for an ear-specialist:—

*Held*, that all that a medical practitioner is required to bring to the performance of his duty is reasonable care and average skill; and he is not responsible merely because some other practitioner of greater skill and greater knowledge might have prescribed a different treatment.

*Town v. Archer* (1902), 4 O.L.R. 383, and *Hodgins v. Banting* (1906), 12 O.L.R. 117, followed.

And, upon the evidence, it could not be found that in his diagnosis M. did not bring to bear reasonable skill or such skill as might reasonably be expected from one in his position—although he assumed to



state confidently that there was no mastoid trouble, when he was unable to say what the real trouble was.

If a physician in charge of a case is unable to diagnose the trouble he is under no legal obligation so to inform the patient and to advise the calling in of a specialist.

The plaintiff was taken from the hospital and an operation for mastoiditis was performed elsewhere; but it was not clearly established that any of the troubles from which the plaintiff was suffering were caused by a delay in the operation—and this in itself was a complete defence to the plaintiff's claim.

As against M. the action was dismissed, but without costs. *Hodgins v. Banting*, 12 O.L.R. at p. 119, referred to on the question of costs.

THE plaintiff, who was for some years employed by the defendant company as a pathologist in connection with its mines and plant, brought this action against the company and one McCauley, a medical practitioner employed by the company as the medical superintendent in charge of a hospital maintained by the company upon its premises, seeking from the company damages for breach of a contract whereby it agreed to furnish him with medical and surgical treatment in case of his illness, in consideration of moneys deducted from time to time from his monthly salary, and seeking from McCauley damages for his alleged negligent treatment of the plaintiff while a patient in the hospital.

The action was tried before WRIGHT, J., without a jury, at a Toronto sittings.

*A. G. Slaght*, K.C., for the plaintiff.

*D. L. McCarthy*, K.C., for the defendants.

March 13. WRIGHT, J.:—The plaintiff was for some years employed by the defendant company as a pathologist in connection with its mines and plant at Copper Cliff, Ontario. The defendant McCauley is a medical practitioner and was employed by the defendant company as the medical superintendent in charge of a hospital maintained by the company at Copper Cliff.

The defendant company retained a certain amount out of the plaintiff's monthly salary and undertook to provide medical care and attention for him and his family in case any of them should become ill while the plaintiff was in its employ.

In the latter part of August, 1924, the plaintiff became ill and was taken to the defendant company's hospital on the 31st August. He was operated upon on the 1st September by the defendant McCauley for appendicitis. Before he had entirely recovered from the operation, he was seized with violent pains in the head, and shortly after the 17th September his ear began to discharge pus,

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Wright, J. and this discharge continued with increasing profuseness until  
1929. the operation by Dr. Thompson on the 6th October.

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At the time this ear-trouble developed, the defendant McCauley was away from Copper Cliff, but returned about the 22nd or 23rd September, when he took charge of the plaintiff's case.

The plaintiff's ear-trouble continued and increased in intensity up to about the 5th October, when he left the hospital at Copper Cliff and proceeded to London, Ontario. He was operated upon on the 6th October by Dr. Thompson, a specialist in diseases of the ear, who testified that he found a very severe case of mastoiditis, the mastoid bone being greatly decomposed with deep-seated necrosis down to the lateral sinus, and he also found the incus floating or detached owing to the action of the disease. In the course of the operation Dr. Thompson touched the facial nerve, although he says in effect such action would not cause any permanent injury to the same or induce facial paralysis. He also removed the incus; as he says, it had become entirely detached and constituted a menace if allowed to remain.

The plaintiff's recovery from the operation was somewhat slow and he is still suffering from the ear-trouble. He claims that his nerves have been seriously affected, that he has partial facial paralysis, a lack of control of the movement of his eyes, is slightly deaf, and his speech is affected. In addition to these ailments, he complained of suffering from the operation for appendicitis, but that may be eliminated from this inquiry, as I find that there is no evidence whatever of any negligence on the part of the defendant McCauley in the operation for appendicitis, or subsequent treatment therefor.

The plaintiff brings this action against the defendant company upon a contract whereby it agreed to furnish him with medical and surgical treatment in case of illness, in consideration of moneys deducted from time to time from his monthly salary, and I propose to deal with this branch of the case before discussing the plaintiff's claim as against the defendant McCauley.

At the conclusion of the plaintiff's case, I intimated that in my view no case had been made out against the defendant company, and I still retain that opinion. I find upon the evidence that the physicians and surgeons provided by the defendant company for the treatment of the plaintiff were competent, and that in the selection of its staff the company exercised due care and skill. See *Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820; *Evans v. Liverpool Corporation*, [1906] 1 K.B. 160. It is true that in these instances the actions were against

public hospitals, but I do not think the principle of law is in any way different. All that the defendant company, in my opinion, undertook to do was to provide competent physicians and surgeons, and it did not warrant that in all details of treatment these physicians and surgeons would exercise reasonable care and skill. The test, as I take it, is whether in selecting its medical staff it exercised due care and skill, and I find that in the present instance it did exercise such care and skill. It follows therefore that as against the defendant company the action will be dismissed.

As already intimated, upon the evidence I can find nothing whatever to justify a charge of negligence against the defendant McCauley either in respect of the operation for appendicitis itself or the subsequent treatment. It is true that Dr. Hooper, of Ottawa, a physician and surgeon of repute, recommended a change in treatment, but none of the medical witnesses have stated that the treatment prescribed by the defendant McCauley was improper, so that the claim for damages in respect of the appendicitis operation may be dismissed from further consideration.

The charge of negligence against the defendant McCauley in respect of the treatment of the ear-trouble is much more serious. The evidence of the plaintiff is that, when he was admitted to the hospital, he told the defendant McCauley to send for a specialist if his condition became worse, and this evidence I accept, but at that time he was referring to the appendicitis only.

The grounds of complaint against Dr. McCauley are : (1) that he was negligent in not diagnosing the mastoid trouble within a reasonable time after the symptoms first appeared; (2) that, as he was not competent to diagnose a mastoid condition, he should have called a specialist or somebody who was competent to diagnose such trouble, especially in view of the fact that the plaintiff's condition was steadily becoming worse.

The evidence establishes that the ear-trouble first developed about the 18th or 19th September, and was almost from the first accompanied by a discharge which continued with increasing prurulence up to the operation. The plaintiff testified that he had severe pains around his right ear and was getting deaf. He also says that on the 23rd or 24th September he requested the defendant McCauley to examine for mastoid; that in the course of such examination, when the latter pressed behind the right ear of the plaintiff, he was told that it caused considerable pain. He further testified that the doctor examined for defect in hearing and found that the plaintiff was deaf. After such examination the defendant McCauley said that the plaintiff had no mastoid.

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Another examination was held five or six days later, and again the defendant McCauley pronounced no mastoid. The plaintiff testified that the defendant did not examine the interior of the ear, and that the only treatment he recommended was swabbing the ear to keep it clear from pus and thereby prevent further inflammation. The plaintiff says that on both occasions when Dr. McCauley examined him he suggested getting a specialist, but was told by the doctor that there was no mastoid and no necessity for a specialist.

The plaintiff's evidence in this respect is corroborated to some extent by his wife. While the plaintiff was suffering from the after-effects of the operation for appendicitis, his wife says, she went to Dr. McCauley and suggested getting somebody else. However, this is immaterial, as it had reference to the condition resulting from the operation for appendicitis.

She, however, says that after the ear-trouble developed she discussed with Dr. McCauley the propriety of sending for a specialist, when the latter replied that there was no sign of mastoid and there would be no mastoid as long as the discharge was of the nature then coming from the ear. The doctor also stated that at that time he did not know what the trouble was.

It would appear to be quite clear from this evidence, which I accept as substantially true, that the defendant McCauley failed to diagnose the trouble as mastoid, and although he was not able to ascertain what the exact trouble was he did not recommend or send for an ear-specialist, which I am convinced most medical men would have done.

The plaintiff's wife had a talk with Dr. Hooper of Ottawa, on the 25th September, about the plaintiff's condition, and was then told to have the plaintiff examined for mastoid. She communicated this to some of the doctors in attendance, but they still remained of the opinion that the plaintiff had not a mastoid.

As already stated, the plaintiff was removed to London about the 5th October, and was operated on for mastoid on the 6th October, by Dr. Thompson, who found the condition already described.

For the defendant, Dr. Harris, who was in daily attendance upon the plaintiff, was called. He testified that he examined the ear with a speculum and instructed swabbing with a mixture of carbolic acid and glycerine. He testified that there was no pain from the mastoid, but I prefer to accept the evidence of the plaintiff and his wife in that particular.



Dr. Harris further testified that on the 23rd September the defendant McCauley examined Jarvis for deafness, but does not speak definitely as to the result of such examination. He does not appear to have diagnosed the trouble as mastoid, and says that in their hospital they have had only six cases of surgical mastoid in eighteen years, in all of which ear-specialists were brought in to perform the operation.

He testified that both the plaintiff and his wife said they did not want an ear-specialist, although this is improbable in view of the fact that when the plaintiff was removed from the hospital he was taken directly to an ear-specialist.

Dr. Campbell, another member of the staff of the company's hospital, who pays special attention to ear-trouble, says that he examined the ear shortly after the discharge started, but that at that time the plaintiff complained of no pain and there was no swelling. He stated that they did not consider it necessary to have a specialist.

The defendant McCauley testified that, shortly after his return on the 23rd of September, he made an examination of the ear for mastoid and found that a lot of pus was being discharged, but there was no tenderness or swelling, and that he examined for mastoid every day, and also tested the hearing. He says that the plaintiff was improving; but, in view of the subsequent developments, this is hard to credit.

He gives it as his opinion that if the discharge continues for four weeks it is probably a case of surgical mastoid, that is a mastoid requiring surgical treatment. He says that, two days before the plaintiff left the hospital, Dr. Harris and he suggested to Mrs. Jarvis that an ear-specialist had better be consulted.

He says that on his examination there was no redness, swelling, or tenderness.

He admits that he told the plaintiff there was no evidence of mastoid, but further says that he would want an ear-specialist to examine for mastoid, as he had never operated for mastoid, although he had been present at operations therefor.

He further says that he did not use the speculum in his examination, but cannot tell whether the wall surrounding the mastoid was drooping or not.

Dr. Perry G. Goldsmith, a specialist in eye, ear, nose, and throat diseases, was called. He said that the treatment of swabbing was a good system to be followed and that in cases of mastoid it is dangerous to operate too early as well as too late. He attributes some of the disabilities from which the plaintiff was

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Wright, J. suffering to the manner in which the operation was performed by  
1929. Dr. Thompson. He says that after Dr. Thompson saw the facial  
JARVIS nerve he should not have done any curretting, and also that the  
v. incus must have been injured in the course of the operation. He  
INTER- says that he would wait three weeks after the discharge began  
NATIONAL before coming to the conclusion that it was mastoid. His evi-  
NICKEL dence is corroborated by Dr. Biggs, who is also a specialist in  
Co. LTD. ear-troubles, and who also says that the incus can only be re-  
moved by artificial means, although he differs in some respects  
from Dr. Goldsmith as to how it might become attached by ad-  
hesions.

Dr. Royce, who is Dr. Goldsmith's senior assistant, also agrees with these medical witnesses, and says he could suggest no other treatment.

Upon this conflicting and contradictory evidence, I have to arrive at a decision as to whether Dr. McCauley was negligent in the details that have been charged against him.

In approaching this question it becomes necessary to consider the degree of skill a medical practitioner is bound to bring to the treatment of his patient. I think that the statements of law in Halsbury's Laws of England, vol. 20, p. 332, are particularly apt in defining the degree of skill. There it is stated that all the practitioner is required to bring to the performance of his duty is reasonable care and average skill and that he is not responsible merely because some other practitioner of greater skill and greater knowledge might have prescribed a different treatment.

This view of the law was adopted in *Town v. Archer* (1902), 4 O.L.R. 383, and in *Hodgins v. Banting* (1906), 12 O.L.R. 117.

The question then is, what constitutes a reasonable degree of skill? The defendant McCauley was the superintendent of a hospital, on the staff of which were four medical practitioners, and one would naturally look for a higher degree of skill in the medical superintendent of such an institution than in the average general practitioner. However, the evidence of the defendant McCauley, Dr. Harris, and Dr. Campbell, as well as some of the specialists, indicates that in the early stages it is difficult to diagnose with any reasonable certainty mastoid-trouble, and that until the discharge persists for three or four weeks it cannot be from that symptom alone accurately diagnosed as mastoiditis. The defendant did not use the speculum in examining the ear and says he was not able or competent to recognise any falling or sagging in the wall of the canal. There is no evidence that a medical man in the position of the defendant McCauley ought to have been

able to diagnose the disease in its early stages. The only singular thing about his diagnosis is that he assumed to state confidently and emphatically that there was no mastoid trouble, when he was unable to say what the real trouble was. It would suggest to a layman that the more prudent course would have been to call in some person who was able to diagnose mastoid. Such a course ought not to have been humiliating to a physician of his standing, who might gracefully admit his defeat and advise the calling in of a specialist.

Upon the evidence I cannot find that in the diagnosis he did not bring to bear reasonable skill or such skill as might reasonably be expected from one in his position.

I accept the evidence of Dr. Thompson that the disease was in an advanced state when he was brought to London on the 5th October, and that an earlier operation would probably have prevented the serious results which followed. However, it would not have been reasonable to expect Dr. McCauley to have operated until he was convinced that the disease of mastoiditis actually existed, and the only lack of skill on his part at that time was in failing to diagnose the disease.

As already mentioned, in my opinion the evidence has failed to establish negligence or lack of average skill in the diagnosis.

The only other negligence alleged is that the defendant McCauley, being unable to diagnose the trouble, should have called in a specialist. I have failed to find in any of the authorities any support for the proposition that if a physician in charge of a case is unable to diagnose the trouble he is under legal obligation so to inform the patient and to advise the calling in of a specialist.

Counsel have not cited to me any case where a physician has been held liable under such circumstances, and I do not think that any liability exists.

In my view, when the doctor brings to bear upon the treatment of the patient a reasonable degree of skill and care under all the circumstances, he has discharged his duty. However regrettable it is in the present case that the disease was not diagnosed at a much earlier date and an operation performed, yet it has not been clearly established that in such event the troubles which resulted from the disease and the operation would have been prevented. It has not been clearly established that any of the troubles under which the plaintiff suffers were caused by a delay in the operation. That in itself would be a complete defence to the plaintiff's claim.

An attempt was made by the defendant McCauley to establish that some, if not all, of the troubles from which the plaintiff is

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Wright, J. now suffering, were due to the manner in which Dr. Thompson performed the operation. The evidence, in my opinion, entirely failed to establish any such contention. The evidence shews that when the patient was brought to Dr. Thompson he was in an extremely dangerous condition requiring an immediate operation and that Dr. Thompson performed the operation properly.

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Applying the tests already stated, I find that the evidence fails to establish actionable liability on the part of the defendant McCauley. The plaintiff's action therefore fails as against him, and will be dismissed, but without costs.

The remarks of the late Chancellor in the case of *Hodgins v. Banting*, already cited, in dealing with the question of costs, 12 O.L.R. at p. 119, appear to me to be particularly applicable to the facts of the present case.

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## [APPELLATE DIVISION.]

WALKERVILLE BREWING CO. LTD. v. MAYRAND.

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*Public Policy—Contravention of Laws of Friendly Foreign Country—“Liquor Export Business”—Common Knowledge—Failure to Prove Foreign Laws—Whether Judicial Notice Taken—Enforcement of Contract.* March 18.

The judgment of RANEY, J. (1928), *ante* 5, upon a motion for an order continuing an interim injunction, turned into a motion for judgment, dismissing the action upon the ground that the plaintiff company was not entitled to maintain it, was set aside upon appeal and the interim injunction was continued until the trial.

*Held*, that, there being no evidence of the fact that the importation of intoxicating liquor into the United States was unlawful, the finding, based on the supposition that it was unlawful and that therefore the company was engaged in an unlawful business, could not be supported.

The courts of one country do not take judicial notice of the laws of another country—they must be proved like any other fact.

Discussion of the law as to contracts deemed to be “against public policy.”

*Per* HODGINS, and GRANT, JJ.A.:—If there is any common knowledge in this country of which the Court should take notice and apply continuously, it is the policy both of the Dominion and of the Province, as set out in their statute law and regulations having the force of law.

While the question of public policy may arise from different considerations than those founded upon explicit enactment, public policy cannot be based upon the views of a judicial officer founded upon his individual conception of “justice, morality, and convenience,” nor unless the same comes within some established principle of law or follows directly from principles recognised in the courts and by the State as part of its public law.

*Janson v. Driefontein Consolidated Mines Ltd.*, [1902] A.C. 484, 491, and *Trinidad Shipping Co. v. Alston*, [1920] A.C. 888, referred to.

AN appeal by the plaintiffs from the judgment of RANEY, J. (1928), *ante* 5.

October 23, 1928. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and GRANT, JJ.A.

*H. D. Barnes*, for the appellants. The learned trial Judge erred in refusing to entertain the action on the ground that common public knowledge of the existence of the “liquor export business,” coupled with the material filed, indicated that the appellants were the lessees of a dock and warehouse that were being used by them for “rum-running” purposes, whereas there is no evidence to support that finding. The trial Judge is not entitled to go beyond the material before him. Even assuming that the appellants were about to break the revenue laws of a foreign country, that is not a reason for our courts refusing to enforce this contract made between the parties. The learned trial Judge

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also erred in dealing with this action on the assumption that the general principles of law as to contracts against public policy should be applied to the facts in issue when there is no evidence proving the existence of any one of the factors declared by the learned Judge to be against public policy. The contract was made in Ontario between residents of Ontario; and, there being nothing in evidence to shew any illegality, it ought to be enforced by the Ontario courts. Contracts which are legal and valid in Ontario ought to be enforced by the courts of Ontario. Reference to C.E.D. (Ont.), vol. 2, p. 882, para. 36; *Holman v. Johnson* (1775), 1 Cowp. 341; *Reid v. Diebel* (1909), 14 O.W.R. 77; *Hill v. Spear* (1870), 50 N.H. 253; *Webber v. Donnelly* (1876), 33 Mich. 469; *Santos v. Illidge* (1860), 8 C.B.N.S. 861; *In re Missouri Steamship Co.* (1889), 42 Ch.D. 321; *Trinidad Shipping Co. v. Alston*, [1920] A.C. 888; *Windsor Truck and Storage Co. v. Carling Export Brewing and Malting Co.* (1925), 28 O.W.N. 302; *Starr v. Chase*, [1924] S.C.R. 495; *Dominion Fire Insurance Co. v. Nakata* (1915), 52 Can. S.C.R. 294; *Clark v. Hagar* (1894), 22 Can. S.C.R. 510.

*J. H. Rodd*, K.C., for the defendants, respondents. The appellants are not lessees of the respondents' lands, but mere licensees. It is clear from the agreement sought to be enforced that the shipping of beer was within the contemplation of both parties. The Court has the right to take judicial notice of the physical condition of the country and the fact that the gasoline launches mentioned in the agreement could be meant for no other purpose than transporting to the United States. The fact that the goods exported could get to no legal landing place is so notorious and within common knowledge that courts should take judicial notice of it and refuse to enforce the contract; *Robinson v. Bland* (1760), 2 Burr. 1077; Dicey on Conflict of Laws, 4th ed., p. 608, rule 160, p. 613, exception 1, p. 610; *Dewütz v. Hendricks* (1824), 2 Bing. 314; *Clugas v. Penaluna* (1791), 4 T.R. 466; Pollock on Contracts, 8th ed., pp. 336-7; Foote's Private International Law, 5th ed., p. 397. The learned Judge was right in assuming that the purpose of the contract is illegal and will result in the laws of a foreign country being broken. It is the duty of the Court, out of courtesy to a neighbouring country and in conformity with the comity of nations, to refuse to enforce any contract which has in view the breaking of the laws of that country.

March 18, 1929. MULOCK, C.J.O.:—The defendant Mayrand owned a certain dock on the Canadian side of the Detroit river,

and by an agreement in writing granted to the plaintiff company the right to ship beer therefrom, it being a term of the agreement that no beer other than that of the plaintiff company should be shipped from the dock. Mayrand conveyed the dock to his co-defendant, who is permitting beer, other than that of the plaintiff company, to be shipped from the dock; and this action was brought for an injunction restraining such shipment. An interim injunction was granted; and, the motion to continue it to the hearing coming before Raney, J., and counsel for all parties consenting, it was turned into a motion for judgment, and, after reserving judgment, the learned Judge dismissed the action. From this dismissal the plaintiff company appeals.

I find it difficult to discover from the learned Judge's reasons for judgment the ground for his holding that the plaintiff company was not entitled to maintain this action. He finds that there exists in Ontario the business of exporting liquor from Canada to the United States of America "in contravention of the constitution and laws of that country," and that such is the nature of the plaintiff company's business.

So far as appears, the importation of liquor into the United States of America is lawful: such importation is not *malum in se*. Whether, and if so to what extent, the prohibition of the importation of liquor into that country is unlawful depends upon the laws of that country. One country does not take judicial notice of the laws of another, but, like any other fact, they must be proved. In this case there is no evidence of any law making the importation of liquor into the United States unlawful. There may be no moral doubt of the existence of such a law, and every one may know—or thinks he knows—of its existence, but courts require legal evidence of material facts; and, there being no such evidence in this case, no legal ground exists for finding it to be illegal according to the laws of the United States to ship liquor from the plaintiff company's dock because of its destination being the United States of America.

Apparently in support of his decision, the learned Judge also refers to the "domestic aspect of the case," and expresses the opinion that "it was inevitable that a percentage of the goods that were warehoused by these men at the border, for export under the laws of Canada, would be sold from the warehouses for consumption in Ontario." If goods are warehoused for export under the laws of Canada, the legal presumption is that they will be lawfully dealt with; and, in the absence of evidence to the contrary, the Court would not be warranted in inferring that they would be dealt with

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in, for example, the manner suggested by the learned trial Judge. Further, he observes that "it was inevitable that, when opportunity offered, the whisky and beer smugglers would bring back return cargoes of goods to be smuggled into Canada."

So far as it appears, it being lawful to export liquor from Canada to the United States of America, the suggestion that "it was inevitable" that such exporters would bring back return cargoes into Canada in violation of the customs laws of Canada would be as applicable to every vessel that carried Canadian goods to a foreign market as to the exporters of liquor to the United States, and, if a legally sound proposition, would mean that all export trade was illegal.

But, assuming it to be unlawful to export liquor to the United States, why, in such a case, was it inevitable that such offenders against the laws of the United States would also offend against the customs laws of Canada? If a person was indicted in Canada for violating the Canadian customs laws, proof that he had violated any or all the laws of the United States would not be evidence that he had violated the customs or any law of Canada.

The learned trial Judge also refers to "the demoralising effect the outlaw traffic would have upon border communities where it has been carried on since the prohibitory laws of the United States became effective in 1920, and upon the officials of the Canadian department of customs and excise, with whom the smugglers would necessarily be brought into intimate and constant contact and who would in a manner become parties to their operations."

The business of exporting liquor to the United States may have the demoralising effect attributed to it by the learned Judge, but such consequences do not determine its illegality; it is legal or illegal irrespective of the consequences.

The learned Judge further observes that "the success of this action would mean the recognition by the Court of the rum-running business as a legitimate Canadian industry." I fail to see the relevancy of this observation.

There being no evidence before the Court that the importation of liquor into the United States of America was unlawful, the finding, based on the supposition that it was unlawful and that therefore the company was engaged in an unlawful business, cannot be supported.

I am of opinion that the judgment should be set aside and a trial had; the interim injunction granted to be continued until the trial; and the costs of this appeal to be costs in the cause.



MAGEE, J.A., agreed with MULOCK, C.J.O.

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HODGINS, J.A.:—Appeal from the judgment of Mr. Justice Raney, dated the 5th September, 1928, whereby he dismissed a motion to continue an injunction granted by a Local Judge and dismissed the action.

The judgment indicates that counsel agreed to the motion being turned into a motion for judgment.

The facts of the action are prosaic enough. Agreements between the plaintiffs and Mayrand, exhibited to affidavits, provided for the leasing by Mayrand to the plaintiffs of a wharf or dock on the Ontario side of the Detroit river. The plaintiffs were to use the dock for the purpose of shipping beer, and it was provided that no beer other than theirs was to be shipped from this dock. Further provisions in the agreements allowed the plaintiffs to erect a warehouse on the dock, and the last agreement provided that Mayrand was to be permitted to use the siding to be put on the property by the plaintiffs "for the purpose of transporting carlots of whisky from the siding for the use of himself and associates in connection with certain arrangements they have made in handling whisky for export." Later on, Mayrand conveyed the dock property to his co-defendants. The plaintiffs allege that the latter, in breach of the covenant entered into by Mayrand, were shipping large quantities of beer, other than that of the plaintiffs, from the dock in question. The injunction above referred to restrained the defendants from proceeding in breach of the covenant that no beer other than that of the plaintiffs should be shipped from this dock. No further evidence was given, and counsel before us did not explicitly assent to the statement of the learned trial Judge that consent had been given to turn the motion into a motion for judgment.

Upon the information afforded by the lease and affidavits which I have mentioned, and without trial or further inquiry or evidence either of facts or of United States law, the learned Judge proceeded to dispose of and dismiss the action. He said:—

"It is common public knowledge that for several years there has existed in this Province an industry known to those engaged in it as the 'liquor export business'—commonly known by those not engaged in it as 'rum-running.' The business—which has attained vast proportions—consists in the exportation of liquor to the United States of America, not through the legitimate channels, but by smuggling and in contravention of the constitution and laws of that country. The men engaged in this business would

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be conspirators and criminals under the laws of the United States, if their acts were done within the jurisdiction of the courts of that country, and upon conviction they would be liable to very severe penalties.

"Of course there is nothing in the material before the Court directly establishing the outlaw character of the business to which the agreements which have been put before the Court relate."

He then proceeded:—

"For anything that appears in the papers, it may have been the intention of the parties that the beer and whisky referred to in the documents were to be sent through the United States Customs, and it was a submission of counsel for the brewing company that the Court must confine itself strictly to the four corners of the material before the Court. I do not agree. I think the Court is not only entitled, but bound, to take judicial notice of the common knowledge to which I have referred, and to read the material filed on this motion in the light of that common knowledge. In the light of that knowledge, the material clearly indicates that the brewing company is not only the lessee of a dock and warehouse that are being used by it for rum-running purposes, but is the employer or abettor of one of the gangs of smugglers that infest the Detroit river frontier."

In the course of his judgment, the learned trial Judge described two different kinds of public policy. First, public policy in the administration of the law by the Court, which he defines as judicial public policy, and, second, public policy in the view of the Legislature. He described the former as the general spirit or purpose of the law as deduced from the course of legislation "or from the principles of justice, morality, and convenience, and applied by the courts in matters concerning which the law is not explicit."

The learned trial Judge was further of opinion that the question was not one at all of what the statute-law of Canada or of Ontario might be, and that it was "as much the duty of the Courts to refrain from creating international enmity as it is of the legislative and executive branches to promote international amity."

And he expresses the view that:—

"If the people of Canada were unanimous in disapproval of the prohibitory laws of the United States, they would still be bound to respect those laws, for the purpose of the matter now in hand, just as much as though they were unanimous in approval of them. In other words, it is for the people of the United States to determine their own laws, and it is for the law-abiding people

of other countries, including Canada, and therefore for the courts of Canada, not to lend aid or comfort to 'ill disposed persons within their borders' in their violation."

He concludes by saying that:—

"The success of this action would mean the recognition by the Court of the rum-running business as a legitimate Canadian industry—which is impossible, however many companies incorporated under Dominion and Ontario law may be engaged in the business, and however many millions of capital may be invested in it."

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It is an ordinary prerequisite to a judgment applying some principle of law, equity, or "public policy" to the litigant parties in a case before a court of law, that it should have been ascertained by sworn testimony what were the facts and circumstances from which the rights or liabilities of the parties might be deduced and from what violations or disregard thereof the action arose. This course would inform the judicial mind whether or not the case at bar was within or outside the ambit of the principle sought to be applied.

It may be conceded that the prohibition law of the United States and its conventional standard of intoxicating drink have formed the economic basis for a system of "bootlegging" and "hijacking," but the consequence of that policy does not, without more, warrant either the assumption that the parties to this case are guilty of an infraction of a foreign law, having no force or validity here, nor a finding that their business is not under our constitution and statutes a legitimate one.

Courts may and should practise and encourage amity with our neighbours, but not to the extent of asserting that inhabitants of this Province are breaking the law of this country without first ascertaining by proper evidence what is the purpose and scope of business which they are actually carrying on.

Lord Haldane in *North Western Salt Co. v. Electrolytic Alkali Co.*, [1914] A.C. 461, used the following language (p. 469):—

"My Lords, it is no doubt true that where on the plaintiff's case it appears to the Court that the claim is illegal, and that it would be contrary to public policy to entertain it, the Court may and ought to refuse to do so. But this must only be when either the agreement sued on is on the face of it illegal, or where, if facts relating to such agreement are relied on, the plaintiff's case has been completely presented."

Mr. Justice McCardie in a late case of *Naylor Benzon & Co.*



APP. DIV. v. *Krainische Industrie Gesellschaft*, [1918] 1 K.B. 331, affirmed  
1929. in [1918] 2 K.B. 486, in speaking of public policy, said:—

“But the Courts have not hesitated in the past to apply the doctrine whenever the facts demanded its application” ([1918] 1 K.B. at p. 342).

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I have cited these remarks in order to make it quite clear that, in view of the statement of the learned trial Judge that there was nothing in the material before the Court directed to establish the outlaw character of the business to which the agreements before the Court related, he was omitting an indispensable part of the procedure necessary to arrive at his conclusion.

But there is a much broader and wider ground upon which the judgment in question should be set aside. This is to be found in the forcible language of the Earl of Halsbury, L.C., in *Janson v. Driefontein Consolidated Mines Ltd.*, [1902] A.C. 484, at p. 491:—

“I do not think that the phrase ‘against public policy’ is one which in a Court of law explains itself. It does not leave at large to each tribunal to find that a particular contract is against public policy. If such a principle were admitted, I should very much concur with what Serjeant Marshall said in the first edition of his work on marine insurance a century ago: ‘To avow or insinuate that it might, in any case, be proper for a judge to prevent a party from availing himself of an indisputable principle of law, in a Court of justice, upon the ground of some notion of fancied policy or expedience, is a new doctrine in Westminster Hall, and has a direct tendency to render all law vague and uncertain. A rule of law, once established, ought to remain the same till it be annulled by the Legislature, which alone has the power to decide on the policy or expedience of repealing laws, or suffering them to remain in force. What politicians call expedience often depends on momentary conjunctures, and is frequently nothing more than the fine-spun speculations of visionary theorists, or the suggestions of party and faction. If expedience, therefore, should ever be set up as a foundation for the judgments of Westminster Hall, the necessary consequence must be that a judge would be at full liberty to depart to-morrow from the precedent he has himself established to-day; or to apply the same decisions to different, or different decisions to the same circumstances, as his notions of expedience might dictate.’”

And at p. 494:—

“I think no more striking example of the mischief which might result from so loose a mode of applying the principle of



public policy in Courts of justice could be found than the example which elicited Serjeant Marshall's protest, which I have quoted above."

I may, perhaps, refer to a case of *Trinidad Shipping Co. v. Alston*, [1920] A.C. 888, where the relation of foreign law to contracts made in British territory is considered and rejected. An agreement made in the island of Trinidad by shippers with the Trinidad Shipping Company provided that the shipping company would pay to the shippers certain rebates upon freights paid by them for the carriage of goods from Trinidad to New York. After the contract had been made and the goods carried and the freights paid, the United States passed a law making rebates illegal and subjecting those who paid them to heavy penalties. The shipping company having refused to pay the rebates, they were sued by the shipper, and the Judicial Committee held that the Act of Congress had no relation to the contract in question, as by British law there was no illegality in a rebate agreement.

In conclusion I may say that I am unable to agree with the learned trial Judge upon the major proposition that the question involved in this case is not one which depends upon Dominion or Ontario statute-law. If there is any common knowledge in this country of which the Court should take notice and which indeed it should apprehend and apply continuously, it is the policy both of the Dominion and of the Province, as set out in their statute-law and regulations having the force of law. While I agree that the question of public policy may arise from different considerations than those founded upon explicit enactment, I do not agree that public policy can be based upon the views of a judicial officer founded upon his individual conception of "justice, morality, and convenience," nor unless the same comes within some established principle of law or follows directly from principles recognised in the courts and by the State as part of its public law.

There is a curious *non-sequitur* in the decision appealed from. By refusing the plaintiffs the right to prevent the defendants from violating the covenant of Mayrand which gave control over the shipments from this dock, the judgment throws wide open to every one the licence to use this dock for "bootlegging" and deprives the lessees of the right to dispute it. If applied to all docks on the river, it might permit consequences which the judgment in appeal is evidently intended to prevent.

The appeal is allowed with costs and the order below set aside

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and the injunction continued till the trial, which both the parties are directed to expedite.

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GRANT, J.A., agreed with HODGINS, J.A.

*Appeal allowed.*

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Note: The decision in the cases of *Foster v. Driscoll*, *Lindsay v. Attfield*, and *Lindsay v. Driscoll* (given on the 13th December, 1928), 45 Times L.R. 185, [1929] W.N. 7, was based upon evidence taken at a trial before Wright, J., as appears from the references of Lawrence, L.J.

#### [APPELLATE DIVISION.]

RENÉ V. CARLING EXPORT BREWING AND MALTING CO. LTD.

*Landlord and Tenant—Lease of Canal-slip and Unspecified Parts of Lands of Plaintiffs—Parts Leased Indicated by Election of Lessee with Knowledge of Lessor—Construction of Lease—Reservation—Waste—Forfeiture—Covenant not to Assign or Sublet—Sharing Possession with Others—Trespass—Assignment of Right to Damages for Tort—Injunction.*

The plaintiffs, reciting that they are the owners of about nine acres of land bordering on a river, and that the defendant brewing company (a licensed exporter) is desirous of leasing parts of said land, by an instrument in writing leased to the company "all that mesuage or tenement being the canal-slip on said lands and such other part of said lands as may from time to time be required by the" company "for the purposes of its business; such purposes to include, among others, docks, warehouses, office and residential buildings, right of way . . . to said canal-slip . . . as may be required;" the lessors "reserving all parts of said lands as are not reasonably required by" the company, and especially reserving the cottage, the fishing shanty, and the ice-house; the lessors "furthermore to have the right for the purposes of their business as ice-dealers to use said canal-slip and said right of way . . . but they are not in any way to interfere or otherwise injure the business or the works of the" brewing company. The lease also provided that all permanent improvements standing or being on the lands at the expiration of the lease or its renewal should be and remain the property of the lessors. The lease was made in December, 1923, and the company occupied and used certain parts of the land, of which the plaintiffs had full knowledge. The company also permitted other persons (also made defendants to the action) to occupy parts of the land:—

*Held*, that, upon the proper construction of the instrument, it was not a mere licence, but a lease, not only of the canal-slip, but of such other part of the land as might be from time to time required by the company for the purposes of its business as a licensed exporter, as and when the company elected to take possession of it.

The right to determine what was required for the purposes of its business rested with the company, and it had made its election, to the knowledge of the lessors.

*Held*, also, that the company, by enlarging the canal-slip and making other alterations, had not committed waste: the permanent character of the property demised was not substantially altered, and there was no loss to the inheritance.

Waste is a tort, and not a ground for forfeiture unless there is an express covenant against it.

Review of the authorities. *West Ham Central Charity Board v. East London Waterworks Co.*, [1900] 1 Ch. 624, specially referred to.

If what was done was waste, a tort had been committed, and that tort could not be waived by the acceptance of rent due under the covenants of the lease.

The company being entitled to use the demised premises for the purposes of its business as a licensed exporter, and there being no evidence to explain what that business included, it had the right to allow the premises under its control, or part of them, to be utilised, with its permission and subject to its supervision, for any business which might properly be done by licensed exporters, and this without breach of the covenant not to assign or sublet without leave.

The lease not being expressed to be in pursuance of the Short Forms of Leases Act, the proviso for re-entry is limited to non-payment of rent or non-performance of covenants and agreements; and neither was shewn.

Forfeiture is a matter *stricti juris*, and the estate will not be divested from the lessee till the forfeiture is conclusively shewn.

Dealing with the covenant not to assign or sublet without leave as if a breach of it would entail forfeiture, and even giving to it the extended meaning set out in the Short Forms of Leases Act, what happened here was not a breach: there is a distinction between assigning or subletting and parting with the occupation or possession of the premises; in the first case the legal title is referred to and not the possession; a covenant against parting with the possession is not broken by sharing the possession with another. The covenant here does not go to the extent of dealing with the possession, and the company remained in legal and actual possession throughout.

*Chaplin v. Smith*, [1926] 1 K.B. 198, followed.

There was therefore no ground for an injunction restraining the co-defendants of the company from continuing to occupy the premises.

The plaintiff company, the beneficial owner of the property under an agreement with the assignees of the lessors, made in July, 1927, would not be entitled to any of the damages which might arise had waste been proved before that date: the right to recover for a tort such as waste is not assignable.

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THE action was brought by Joseph René, John René, and the Ohio Realty Ltd., against the Carling company (above named) Marco Leon, Harry Low, Sam Low, and the Bermuda Export Company Ltd., for a declaration that a certain lease made to the Carling company was null and void, for a mandatory order requiring the defendants to return the demised premises in good order to the plaintiffs, and for an injunction and damages.

The action was tried before WRIGHT, J., who gave judgment in favour of the plaintiffs. The defendant the Carling company



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appealed and the plaintiff the Ohio Realty Ltd. cross-appealed from the judgment of WRIGHT, J.

November 8 and 9, 1928. The appeal and cross-appeal were heard by MULLOCK, C.J.O., MAGEE, HODGINS, and GRANT, J.J.A.

W. N. Tilley, K.C., and L. R. MacDonald, for the defendant company. The premises in respect of which the action was brought were lands covered with water (called a "slip"). The defendant company was given certain rights over the slip for the purpose of carrying on its business. The question is, whether waste has been committed or whether the defendant company is entitled to alter the premises so as to make them suitable for its business. The lease provides that all permanent improvements, including improvements to the slip, shall remain the property of the lessees. On the documents the defendant company was entitled to do everything it did and was even bound to do some of the work within a certain time. The lease gave the defendant company wide powers to convert the property to make it suitable for its business. In any event, the plaintiffs were aware of what was being done, and their conduct, in standing by without complaint and in accepting rent subsequent to the doing of that which they now complained of, was a waiver of their rights. As far as the assigning or subletting is concerned, the defendant company relies on the Landlord and Tenant Act, R.S.O. 1927, ch. 190, sec. 22. There was no legal tenancy created. Others using the premises were mere licensees. The defendant company never parted with the property, and at all times continued to use it for its own purposes. Reference to *Cornish v. Boles* (1914), 31 O.L.R. 505; *Straus Land Corporation Ltd. v. International Hotel Windsor Ltd.* (1919), 45 O.L.R. 145; *Herschorn v. St. Mary's Young Men's Society* (1915), 49 N.S.R. 260; *Peebles v. Crosthwaite* (1897), 13 Times L.R. 198.

John Sale, K.C., for the plaintiffs other than the Ohio Realty Ltd., respondents, and E. C. Awrey, for the plaintiff the Ohio Realty Ltd., respondent and cross-appellant. The lease contemplates the use by the defendant company of the plaintiffs' property for a particular purpose. The character of the slip was already determined when the lease was made. The defendant company had the right only to use it in its then character for the purposes of its business and had no right to deepen or widen it so as to alter its character. The document is not a lease but a licence merely, because the lands are not made certain but are described as the lands necessary for the purpose of the defendant company carrying



on its business as an exporter. Being a licence, it cannot be assigned. Reference to Bacon's Abridgment, vol. 4, p. 80; Sheppard's Touchstone, p. 250; *Pearce v. Watts* (1875), L.R. 20 Eq. 492; Halsbury's Laws of England, vol. 10, p. 457, para. 800. The plaintiffs accepted rent for 1927 on the understanding that a bond to restore the property at the termination of the lease would be given as promised by the defendant company. In such circumstances, the acceptance of rent by the plaintiffs was not a waiver of their rights. In any event there was no waiver of the waste committed in 1937.

No one appeared for the defendant the Bermuda Export Company Ltd.

March 18, 1929. The judgment of the Court was read by HODGINS, J.A.:—Appeal from the judgment of Mr. Justice Wright in an action by the owners of about nine acres in Sandwich West, on the Detroit river, who claim the forfeiture of a lease made to the Carling company on the 31st December, 1923, and an injunction against the other defendants restraining them from trespassing on the demised premises. The learned trial Judge refused to declare the lease forfeited on the ground put forward, namely, that of waste, but gave the plaintiffs damages for the waste and trespass complained of, to be ascertained by the Local Master, and he granted an injunction restraining the co-defendants of the Carling company from continuing to occupy the premises or to trespass thereon.

The defendant the Carling company appeals on the ground that the construction put upon the lease by the learned trial Judge is erroneous; that no waste or trespass was committed; and that it had the right to permit its co-defendants to carry on such business as it consented to upon the premises leased to it.

The plaintiffs found their claim upon the commission of waste by the Carling company on the premises which they leased to it, and do not call in question in their pleadings the fact that the lands covered by the lease included that part on which waste was said to have been committed, but argued at the trial and before us that, apart from the "canal-slip," the document operated as a licence only as to the other lands. The learned trial Judge gave effect to this contention.

The lease between the Renés and the Carling company contains these words:—

"They, the said lessors have demised and leased and by these presents do demise and lease unto the said lessee all that messuage

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or tenement being the canal-slip on said lands and such other part of said lands as may from time to time be required by the party of the second part for the purposes of its business; such purposes to include, among others, docks, warehouses, office and residential buildings, right of way from said Front-road to said canal-slip, and tracks for electric street-cars as may be required: the parties of the first part, however, reserving all parts of said lands as are not reasonably required by the party of the second part, and they especially reserve, among other parts, the cottage, the fishing shanty, and the ice-house. The parties of the first part furthermore to have the right for the purposes of their business as ice-dealers to use said canal-slip and said right of way in order to store ice and dispose of the same, but they are not in any way to interfere or otherwise injure the business or the works of the party of the second part. . . .

"And it is further agreed and understood by and between the parties hereto that all permanent improvements such as buildings, docks, slips, tracks, and so forth, standing or being on the said lands at the expiration of these presents or at the expiration of the renewal of these presents, shall be and remain the property of the parties of the first part."

I am unable to agree in the construction placed upon the lease by the learned trial Judge, whose view is expressed in these words:—

"I think the proper construction to place upon this instrument is that it is a lease of the canal-slip, which could be ascertained by reference to extrinsic circumstances, and thus it is definite so far as that is concerned.

"As to the remaining portion I do not think it operates as a lease. The lands are not definitely described. It reads, 'Such other part of said lands as may from time to time be required by the party of the second part for the purposes of its business.' One day, it may be, all these lands will be required, and the next day but a small portion. I do not think an instrument that deals with lands in that manner could be said to be a lease; I think the most that could be said is that it is a licence from time to time to occupy such portion as may be required by the defendant company for the purposes of its business. I therefore hold that as to the property other than the canal-slip it does not operate as a lease but merely as a licence."

My reasons for so differing are that the recital that the plaintiffs are owners of about nine acres in Sandwich West is followed by the statement that the Carling company is desirous of leasing

parts of said land, indicating more than what is first mentioned in the description.

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The words of demise, which comprise "all that messuage or tenement being the canal-slip on said lands *and such other part of said land as may from time to time be required*," etc., by the Carling company for the purposes of its business, clearly carry out the meaning I have indicated, while the reservation made by the Renés extends only to "all parts of said lands *as are not reasonably required*" by the Carling company for the purposes of its business as a licensed exporter, and not merely to the canal-slip.

Emphasis is given to this construction by the fact that towards the end of the lease it is agreed "that all permanent improvements such as buildings, docks, slips, tracks, etc., standing or being on the said land at the expiration of these presents or at the expiration of the renewal of these presents," are to be the property of the Renés.

By the words "such other part of said lands as may from time to time be required" by the Carling company for the purposes of its business, that part is clearly leased to that company, as and when the company so elects to require it and take possession of it for the purposes of its business.

In Sheppard's Touchstone it is said at pp. 250, 251:—

"If a grant be incertain altogether, and have not sufficient certainty in it, and cannot be made certain by some matter *ex post facto*; it is void. . . . If one grant to me a rent, or a robe . . . or common of pasture, or rent; in the disjunctive, which is at first very incertain; yet this grant may become good, for if I make my election, or he pay the rent, or perform the grant in either part; the grant is now become good. So if one be seised of two acres of land, and he doth lease them for life, and grant the remainder of one of them, and doth not say of which, to I.S. in this case, if I.S. make his election which acre he will have, the grant of the remainder to him will be good."

And at p. 252: "If a man grant two acres, to have and to hold the one in fee-simple and the other in fee-tail . . . and doth not set down which in fee-simple, &c., in certain; yet this grant is good, and the grantee hath the election."

In Bacon's Abridgment, vol. 4, it is said at p. 80:—

"If one makes a lease for years to another for so many years as J.S. shall name, this at the beginning is uncertain; but when J.S. has named the years, this ascertains the commencement and continuance of the lease accordingly."



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And at p. 81: "If A., seised of a great waste, grants the moiety of a yard-land lying in the waste, without ascertaining what part, or the special name of the land or how bounded, this may be reduced to a certainty by the election of the grantee . . . So, if a man grant 20 acres parcel of his manor, without any other description of them, yet the grant is not void; for an acre is a thing certain, and the situation may be reduced to a certainty by the election of the grantee. . . . If a man grant 600 cords of wood out of a large wood, the grantee hath election to take them, when, and in what part of the wood, he pleases, without any appointment of the grantor, and, consequently, may assign his interest in them to a third person, and he shall have the like election."

In Halsbury's Laws of England, vol. 10, pp. 457-8, paras. 800-1, the following occurs:—

"An uncertainty upon a written instrument which remains after all methods of interpretation have been exhausted may sometimes be removed by the election of one of the parties; as (1) where there is a grant of one of certain definite things, or of land defined in amount, but indefinite in position; or (2) where a grant of a definite thing may operate in either of two ways. . . .

"Where an uncertainty is curable by election, the election lies with the party who has to do the first act towards completion of the grant; thus, where the grant has been actually made, though in an uncertain form, the grantee can complete it by taking one of the various things offered him, or by otherwise selecting the particular gift within the specified limits. But if the matter lies only in agreement, then the grantor can fulfil his agreement in accordance with his own election. In the case of a lease determinable at various periods the option of determining it lies with the lessee (unless otherwise provided); this result is assisted by the maxim that the lease is to be construed most favourably to the lessee."

In *South Eastern Railway Co. v. Associated Portland Cement Manufacturers (1900) Ltd.*, [1910] 1 Ch. 12, the Court held a railway company bound by an agreement, relating to their land, that the landowner, his heirs, appointees, or assigns, might at any time thereafter at his or their own expense make a tunnel under the land in question to join the lands severed by the railway company. Farwell, L.J., in the Court of Appeal, said that the agreement amounted to a re-grant of an easement by the railway company to the landowner, and that the right to select the site of the tunnel was vested in him; and the learned Lord Justice said that



he would have no hesitation in decreeing specific performance against the railway company.

In this case the right to determine what was required for the purposes of its business rested with the Carling company. It has made its election; it has occupied and used certain lands for those purposes, and the plaintiffs, during the years in which these additional lands were taken possession of and used, had full knowledge thereof, and became entitled under the lease to all permanent improvements erected on them and "standing or being on the said land at the expiration of these presents." It is very difficult indeed to understand the argument which excludes these lands as part of the leased premises, when such extensive works on them were contemplated as "docks, warehouses, office and residential buildings, right of way from said Front-road to said canal-slip, and tracks for electric street-cars." In this view of the meaning of the lease, the question of waste, so much argued before us, diminishes greatly in importance. For, if, subject to what is to be said as to the additional dredging, the lands which the Carling company required from time to time for the purposes of its business, such purposes being those I have indicated, are covered by the lease and are part of the demised premises, it is very hard to see how anything that was done upon or in regard to them can possibly be considered as waste. In the case of vendor and purchaser, alterations of the premises sold permitted by the agreement are not, if the contract be rescinded, considered as alterations to the prejudice of the vendor, in dealing with the question of *restitutio in integrum*. See *McNiven v. Pigott* (1915), 33 O.L.R. 335.

It was argued, however, that waste was shewn and was a ground for forfeiture. Waste, however, is a tort (*Defries v. Milne*, [1913] 1 Ch. 98), and not a ground for forfeiture unless there is an express covenant against it. Damages or an injunction may be given in proper cases restraining the further commission of the tort. In a case for injunction it must be of "a substantially injurious character:" *per* Lord O'Hagan in *Doherty v. Allman* (1878), 3 App. Cas. 709, at p. 724. But what was done here could not be waste if judged by the rules mentioned and discussed by Buckley, J. (afterwards Lord Wrenbury), in *West Ham Central Charity Board v. East London Waterworks Co.*, [1900] 1 Ch. 624. In that case Buckley, J., says (p. 636):—

"If the permanent character of the property demised is not substantially altered, as for instance, by the conversion of pasture land into plough land, by breaking up ancient meadows, or the

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like, I conceive that the law is that it is not now waste for the tenant to do things which within the covenants and conditions of his lease he is not precluded from doing. Within those covenants and conditions he may use his holding as he pleases."

In the lease in this case there are no restrictive covenants dealing with waste, repair, etc., and there is in law no implied covenant against waste: *Foa on Landlord and Tenant*, 5th ed., p. 280.

There are expressions in many cases shewing how closely waste is distinguished from the intended or proper use of the demised premises. In *Saner v. Bilton* (1878), 7 Ch. D. 815, Fry, J., said (p. 821): "I should be prepared to hold that no user of a tenement which is reasonable and proper, having regard to the class to which it belongs, is waste." In *Manchester Bonded Warehouse Co. v. Carr* (1880), 5 C.P.D. 507, the Court said: "In the absence of an express agreement to that effect, a tenant is not liable for the destruction of the property let to him if such destruction is in fact due to nothing more than a reasonable use of the property, and any use of it is in our opinion reasonable provided it is for a purpose for which the property was intended to be used, and provided the mode and extent of the user was apparently proper, having regard to the nature of the property and to what the tenant knew of it and to what as an ordinary business man he ought to have known of it."

And there is here no negative covenant, the importance of which is pointed out in *Doherty v. Allman* (*ante*).

In a late case on the subject, *Rose v. Spicer*, [1911] 2 K.B. 234, 254, Buckley, L.J., whose dissenting judgment was adopted by the House of Lords, *Hyman v. Rose*, [1912] A.C. 623, said: "The thing demised is premises which the lessee may consistently with the lease use for many purposes for which they are without alteration and adaptation not suitable. A right reasonably to alter and adapt is to be implied."

What was done here was merely the shifting of land not covered by water to adjoining land, leaving the water to flow over the space thus cleared, and occupying, with the earth so taken out, a space adjoining the new bank.

The making of slips is evidently contemplated by the lease, and the mode in which the slip has been enlarged seems unobjectionable, as the earth is there to be filled back again, which can readily be done if desired, and it cannot be said that there is any substantial alteration in the permanent character of the property demised.

For these reasons, I think a case of waste has not been made out in any way, either in the enlargement of the slip or in anything else that is complained of. There is no loss to the inheritance as such, and nothing in the evidence brings it within measurable distance of any of the considerations which were given effect to in the *West Ham* case.

I am not impressed, however, with the argument that the plaintiffs, if they had any rights, have waived them by the receipt of rent on the 29th December, 1926. If what was done was waste, then a tort had been committed, and that tort could not be waived by the taking of rent due under the covenants of the lease, though it is strong evidence to my mind that the lessors, who were aware of what was going on, were not seriously objecting, or even objecting at all at that time, to the enlargement of the slip.

It is said that, whether the enlargement of the slip was waste or not, there was a special bargain as to it, namely, that the Carling company should give a bond to restore the premises to the original condition on the termination of the term or its renewal. If this was made out, the Carling company should of course implement it. But there is no satisfactory evidence on which to found anything, so that all this Court can do is to say that this judgment shall not prejudice the plaintiffs in any action they may bring upon that special contract, if so advised.

The judgment of the learned trial Judge restrains the defendants, other than the Carling company, from continuing to occupy the premises in question or to trespass thereon. I do not think this can be supported upon the evidence given at the trial. The Carling company was entitled by virtue of its lease to use the demised premises for its purposes as a licensed exporter. No attempt was made at the trial to define or explain what the business of licensed exporter included, and without pertinent evidence I am quite unable to come to the conclusion that it had not the right to allow the premises under its control or part of them to be utilised, with its permission and subject to its supervision, for any business which might properly be done by licensed exporters, and this without breach of the covenant not to assign or sublet without leave.

Under the lease in question here, which is not expressed to be in pursuance of the Short Forms of Leases Act, the proviso for re-entry is limited to non-payment of rent or non-performance of covenants and agreements.

No non-performance of any covenants or agreements is proved; indeed, all covenants and agreements which necessitated perform-

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ance by the defendants have been carried out. Forfeiture is a matter *stricti juris*, and the lessor must give strict proof of any breach, as the estate will not be divested from the lessee till the forfeiture is conclusively shewn.

But, apart from that, and dealing with the covenant not to assign or sublet as if a breach of that covenant would entail forfeiture, what happened here is not a breach of that covenant. This is so even if the extended meaning given by the Short Forms Act is treated as part of this lease, that is, that the lessor shall not "assign, transfer, or set over, or otherwise by any act or deed procure the said premises or any of them to be assigned, transferred, set over, or sublet unto any person or persons whomsoever," without consent in writing. The distinction is clear between the assigning or subletting and the parting with the occupation or possession of the premises. In the first case, the legal title is referred to and not the possession, and there is a clear distinction between the two. See *Russell v. Beecham*, [1924] 1 K.B. 525.

Abbott, C.J., in *Doe v. Hogg* (1824), 4 D. & R. 226, an action for ejectment for breach of covenant not to "assign, transfer, set over, or otherwise part with the said messuage . . . or any part thereof," said (p. 228): "I am clearly of the opinion that the effect of the covenant is only to restrain the lessee from completely alienating the legal interest in the premises to the prejudice of the landlord, without his consent in writing."

*Peebles v. Crosthwaite*, 13 Times L.R. 198, is a case frequently referred to, which has been followed and applied in *Jackson v. Simons*, [1923] 1 Ch. 373, and *Chaplin v. Smith*, [1926] 1 K.B. 198. The earlier case is thus referred to in *Jackson v. Simons*:—

"The defendant moreover retained the legal possession of the whole of the premises at all material times and, as pointed out by Romer, J., in *Peebles v. Crosthwaite*, a lessee who retains such possession does not commit a breach of a covenant against parting with possession by allowing other people to use the premises. The defendant did not therefore, in my judgment, commit any breach of the covenant against underletting or parting with the possession of the demised premises or any part thereof."

The learned trial Judge, in the latter case ([1923] 1 Ch. at p. 381), asks himself the question, "Does it" (such a covenant as above) "also include a covenant or condition against sharing the possession of the land leased?" and holds that a covenant against sharing the possession is another distinct covenant, and that a



covenant against parting with possession of the demised premises is not broken by sharing the possession with another. App. Div.

In *Chaplin v. Smith* the Court of Appeal was of opinion that if, as they found, the appellant and the successive companies came to terms on the basis that he neither could nor would part with possession, but would at all costs remain in possession himself and allow the company's business to be conducted on the premises while he remained in possession, then in view of the authorities there was no parting with possession. 1929.

The covenant here does not go to the extent of dealing with the possession; and, whatever else may be said, it is quite clear that in this case the Carling company was in legal possession throughout, and whatever was done by others was done by its permission while it remained in legal and actual possession and control of the premises. RENÉ v. CARLING EXPORT BREWING AND MALTING Co. LTD.

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I am therefore of the opinion that the injunction against the co-defendants of the Carling company cannot be supported.

The position of the plaintiffs remains to be considered. The Ohio Realty Ltd., which is shewn to be the beneficial owner of the property under an agreement with the assignees of the Renés, dated the 14th July, 1927, would not be entitled to any of the damages which might arise had waste been proved prior to the 14th July, 1927. The right to recover for a tort such as waste is not assignable: *Defries v. Milne* (*ante*). The Renés themselves, for the reasons I have given, are not entitled under the facts of the case to any such damages.

On the whole, therefore, I think the judgment must be set aside, the appeal should be allowed and the action dismissed both with costs in favour of the defendants against all the plaintiffs.

*Appeal allowed.*

[APPELLATE DIVISION.]

OAKES V. BRITISH NORTH WESTERN FIRE INSURANCE CO.

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*Pleading—Action by Insured and Trustee for Creditors upon Fire Insurance Policy—Counterclaim against Insured and others for Fraud and Conspiracy—Order Striking out as Embarrassing—Rule 137.* March 18.

The right to counterclaim should not be used in such a way as to embarrass and inconvenience the fair trial of the action as originally constituted.

In an action brought by O., as trustee for the creditors of S., and by S. herself, on an insurance policy against fire issued by the

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defendants upon the stock-in-trade and fixtures of S., and by her assigned to O., a fire having occurred which damaged the stock-in-trade and fixtures, the defendants by their statement of defence denied liability and charged S. with having misrepresented to them, and fraudulently omitted to communicate to them, certain material facts, and also alleged that she wilfully, grossly, and fraudulently exaggerated her loss and made false statements in her declaration proving her claim. They also denied that the loss was as large as stated by the plaintiffs, and asserted that the fire originated by an act of design or procurement on the part of S. In a counterclaim, the defendants repeated these allegations, and then alleged that C. and other persons, named as defendants to the counterclaim, conspired with each other to have the policy issued to and in the name of S. only as the owner of the insured property, with intent to deceive the defendants, and also that they conspired to set fire to the property insured. The defendants sought also to recover on their counterclaim all moneys expended by them in discovering and establishing a plot to defraud them:—

*Held*, that the counterclaim tended to embarrass and prejudice O., the real plaintiff in the action, and should be struck out under Rule 137.

For the matters alleged in the counterclaim O. was not responsible; the defendants, if they proved their defence, would effectually defeat the claim of O. as assignee of the policy; and there was no need to prove a conspiracy or to bring in S.'s associates in the conspiracy.

*Sovereign Bank of Canada v. Parsons* (1909), 18 O.L.R. 665, applied.

*Tobin v. Commercial Investment Co.* (1915), 22 B.C.R. 481, distinguished.

The allegation that S. and the other defendants to the counterclaim were together liable for the costs and expenses claimed ought not to be allowed to embarrass the beneficial plaintiff; and the whole counterclaim should be struck out, reserving to the defendants the right to proceed against S. and the others in a separate action in which this judgment is not to be treated as a bar.

AN appeal by the plaintiffs (by leave) from an order of RANEY, J., in Chambers (4th December, 1928), dismissing the plaintiffs' motion to strike out the defendants' counterclaim.

January 17. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and MIDDLETON, J.J.A.

*R. T. Harding*, K.C., for the appellants.

*F. J. Hughes*, K.C., for the defendants, respondents.

March 18. The judgment of the Court was read by HODGINS, J.A.:—The action is brought by Oaks, as trustee of the creditors of Elizabeth Smookler, and by Elizabeth Smookler, on a certain insurance policy against fire issued by the defendants upon the stock-in-trade and fixtures of the plaintiff Elizabeth Smookler and by her assigned to her co-plaintiff. A fire occurred on the 26th April, 1928, which damaged the said stock-in-trade and fixtures, and it is alleged that the loss recoverable under the policy amounts to \$1,726.20.

The defendants deny liability and charge Elizabeth Smookler, the insured under the policy, with having misrepresented to the defendants, and fraudulently omitted to communicate to them, certain material facts, particulars of which are set out in the statement of defence, and also that she wilfully, grossly, and fraudulently exaggerated her loss and made false statements in a statutory declaration proving the claim.

The defendants further deny that the loss was as large as claimed by the plaintiffs, and assert that the fire did in fact originate by an act of design or procurement on the part of the said Elizabeth Smookler.

There are some other defences, but these are the principal ones, and, as I mention, they charge Elizabeth Smookler with fraud, perjury, and arson.

The counterclaim by the defendants repeats the allegations contained in the statement of defence, and then goes on to allege that Elizabeth Smookler and three other persons, who with her are named as defendants in the counterclaim, conspired with each other to have the policy issued to and in the name of the said Elizabeth Smookler only as the owner of the insured property, with intent to deceive the defendants, and also that they conspired to set fire to the property insured.

The counterclaim further alleges that, in view of the facts set forth, and by reason of the said conspiracy, the defendants have been obliged to incur considerable expense, and they seek by their counterclaim to recover all moneys, costs and expenses, which have been already expended, or which they may be obliged to expend, by reason of the claim of the said Elizabeth Smookler under the policy, and by reason of the conspiracy alleged.

Rule 112 now in force is in part as follows:—

“Where a defendant sets up a counterclaim which raises questions between himself and the plaintiff and any other person he shall add a second style of cause,” etc.

The questions raised by this counterclaim, it will be observed, are between the defendants and only one of the plaintiffs, the assignor of her co-plaintiff. They are matters for which the plaintiff Oaks is not responsible and for which he cannot be made liable.

I think the counterclaim tends to embarrass and prejudice the real plaintiff in the action.

It is quite plain that the defendants can, by proving their defence to the action, effectually defeat the claim of the plaintiff Oaks as assignee of the policy of insurance, for if the plaintiff

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Elizabeth Smookler was engaged in the conspiracy with the other parties named, to do the things alleged, her actions alone, or her complicity in what others did, would suffice to vitiate the policy without the necessity of proving a conspiracy or of bringing in her co-conspirators. If she set fire to the premises or was a party to the setting of the fire which destroyed the insured property, that is a good defence to the action and does not need to be raised by counterclaim. Nor does it advance the matter at all that she had accomplices who conspired with her to do it. The counterclaim is, as I have said, against her as only one of the plaintiffs, and plainly the matters set up in it could not be effectively pleaded against the plaintiff Oaks, who was not a party to any of the matters alleged in the counterclaim, except as a defence nullifying his claim as assignee of the policy. The principle on which *Sovereign Bank of Canada v. Parsons* (1909), 18 O.L.R. 665, was decided is, I think, applicable in this case.

See also *Girardot v. Welton* (1900), 19 P.R. 162, 201.

The case of *Tobin v. Commercial Investment Co.* (1915), 22 B.C.R. 481, referred to by the defendants, is, to my mind, not applicable. The gist of it seems to be found in this sentence:—

“If the plaintiff should succeed in the action on grounds which would still leave him liable in tort, the defendant company might find itself in the position of having to pay whatever sum was awarded against it and yet not be able to set off what it might have recovered on its counterclaim had the two issues been tried together.”

No such question as arose in the British Columbia case is in issue here, and that decision is no authority for retaining the counterclaim.

Here, if the plaintiff Oaks succeeds, it will be due to the failure of the defendants to establish the fraud, perjury, or arson set up as against his assignor in the making of the policy or in seeking to prove her claim thereunder.

Whether or not Elizabeth Smookler and the others named as defendants in the counterclaim are together liable for the costs and expenses claimed herein is a novel question. It ought not to be allowed to embarrass the beneficial plaintiff in so far as it extends to and includes the other defendants by counterclaim, whose activities may have been far-reaching. While useful to the defendants if they are parties to the counterclaim, so that they can be examined for discovery, and in other ways, their doings are not necessary to the determination of the real issues here. I cannot convince myself that any useful purpose will be served



by involving the real plaintiff in this action in the determination of a claim for the expenses of lawyers, detectives, etc., in discovering and establishing a plot to defraud the defendants. Such a claim is best tried by itself, and I would reserve to the defendants the right to proceed against Smookler and the other parties in a separate action if they have any real claim.

Rule 137 is: "Any pleading which may tend to prejudice, embarrass or delay the fair trial of the action may be struck out or amended."

This gives jurisdiction, and I think we ought jealously to guard against the right to counterclaim being used in such a way as to embarrass and inconvenience the fair trial of the action as originally constituted. The reasons I have mentioned seem sufficient to indicate that no injustice will be done to the defendants by the order now proposed.

The appeal should be allowed with costs and the counterclaim be struck out with costs throughout. The right is reserved to the defendants to bring a separate action against the defendants by counterclaim if so advised, in which case this judgment is not to be treated as a bar.

*Appeal allowed.*

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[APPELLATE DIVISION.]

HARRIES HALL & KRUSE V. SOUTH SARNIA PROPERTIES LTD.

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*Architects and Surveyors—Professional Services—Remuneration for—Mistakes—Negligence or Want of Skill—Right of Employees to Damages—Method of Ascertaining—Actions Originally Tried without a Jury—Right of Divisional Court to Direct Assessment of Damages by Jury—Judicature Act, R.S.O. 1927, ch. 88, secs. 11, 26—R.S.O. 1897, ch. 51, sec. 52.*

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In an action brought by landscape architects against the owners of a tract of land to recover a balance alleged to be due of the amount charged for the architects' services in preparing for the owners plans for the subdivision of the tract and other services, it was *held*, upon the evidence, that the owners were entitled to recover the balance claimed.

The owners by a counterclaim against the architects sought to recover damages on the ground of the architects' failure to exercise reasonable skill in the performance of their services, whereby the owners were put to great expense; and it was *held*, that the evidence disclosed a sufficient basis to indicate a breach on the part of the

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architects of their implied obligations as professional men, and the owners were entitled to recover on their counterclaim.

In another action brought by the owners against land surveyors, who, at the owners' request, performed services in collaboration with the architects in respect of the same tract of land, which action was tried together with the claim and counterclaim in the first action, it was *held*, upon the evidence, that the surveyors had failed in the duty which they had undertaken, to exercise a reasonable degree of professional skill, and that the owners were entitled to recover from them the damages attributable to their default.

And *held*, that, after the total damages suffered by the owners had been ascertained, they should be apportioned between the architects and the surveyors in such proportions as the tribunal assessing the damages should deem fair and just, having regard to all the surrounding facts and circumstances.

The situation being peculiarly one in which the damages recoverable by the owners could best be ascertained and determined by a jury, it was directed by a Divisional Court of the Appellate Division, upon appeal from the judgment of the Judge who tried the actions together without a jury, that, for the purpose of ascertaining the damages, the two actions should go down for hearing together, and the damages be assessed by a jury, having regard to the instructions, directions, and attitude of the owners, as communicated to the architects and surveyors.

The Court had jurisdiction to direct that the damages be assessed by a jury: Judicature Act, R.S.O. 1927, ch. 88, secs. 11, 26; Judicature Act, R.S.O. 1897, ch. 51, sec. 52.

In the first action the plaintiffs (landscape architects and engineers, carrying on their profession in Toronto), claimed from the defendants a balance of \$4,875.05 for professional services rendered.

The defendants denied liability and counterclaimed for damages, alleging mistakes and errors made by the architects in the work they were engaged to do.

In the second action the plaintiffs claimed a return of \$2,988.55 paid to the defendants Baird & Baird (provincial land surveyors, practising their profession at Sarnia), for professional services rendered; \$5,089.48 paid to the architects in the first action; and \$10,000 damages for alleged mistakes and errors.

The two actions and the counterclaim in the first were (by consent) tried together before FISHER, J., without a jury, at Sarnia.

*J. A. Rowland*, for Harries Hall & Kruse, the plaintiffs in the first action.

*A. I. McKinley*, for the South Sarnia Properties Ltd., defendants in the first action and plaintiffs in the second.

*J. H. Rodd*, K.C., for Baird & Baird, the defendants in the second action.

October 1, 1928. FISHER, J.:—The South Sarnia Properties Ltd. (to be referred to as the “owners”) purchased for subdivision and resale upwards of 900 acres of land adjoining the City of Sarnia. They required the services of Harries Hall & Kruse (to be referred to as the “architects”), and early in 1924 the owners engaged them to propound a general scheme and to prepare a street and block plan. To do this work the architects, who were not land surveyors, informed the owners that they would require the services of a land surveyor. The owners engaged John A. Baird, a member of the defendant firm in the second action, to furnish the architects with such information as they might require.

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The architects made known to the surveyor that they had been engaged to prepare a town planning scheme of the whole property, and that part of the scheme was to tie up the subdivision with the City of Sarnia.

The architects requested the surveyor to furnish them with a sketch shewing a traverse of the property and the location of the south side of St. Clair-avenue produced westerly from the Scott-road to the west side of Vidal-street.

The surveyor prepared a sketch and also a blue print of a plan made by A. S. Code, O.L.S., known as Bray’s Survey of the Indian Reserve on the east, and these were forwarded to the architects on or about the 19th June, 1924.

The architects state that, relying on the information furnished by the surveyor, they prepared a street and block plan, and, as required, submitted it to the Ontario Railway and Municipal Board and to the interested municipalities for their approval. In September, 1924, the Board and municipalities approved of the street and block plan. The surveyor was then instructed by the owners to “stake out” the property and prepare for registration a block and street plan shewing the blocks that were subdivided into lots.

Before the staking was completed, the architects, at the request of the owners, prepared on the 26th September, 1924, a plan and also a “sales” plan. The reason given for the preparation of these two plans, at this time, was that the owners were anxious to commence selling lots upon these plans.

For the purpose of staking, the surveyor was furnished with copies of these plans, which shewed the subdivision of the blocks into lots and the numbers of the lots and their measurements. In staking out the property the surveyor discovered two discrepancies between the architects’ plans and the conditions upon the ground:



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(1) relating to a short measurement along the Scott-road, and the second at the intersection of Tashmoo-avenue with the easterly limit of Vidal-street. The first discrepancy had the effect of shewing on the two plans St. Clair-avenue farther south than it was upon the ground; and (2) at the intersection of Tashmoo-avenue with the easterly limit of Vidal-street, resulting in Vidal-street being located too far north. These discrepancies were by the surveyor brought to the attention of the architects.

I note here that the surveyor admitted that he had given to the architects an incorrect measurement along the Scott-road. It appears that this mistake was caused by the surveyor having accepted as accurate a row of stakes planted by Code in staking out an adjoining property, known as the Laskey-McMann property. It turned out that these stakes were south of the true limit of St. Clair-avenue to the extent of 12 feet at the Scott-road and 17 feet at the west limit of the Laskey-McMann property.

There is some conflict between the architects and surveyor as to who was responsible for the discrepancy at the intersection of Tashmoo-avenue with Vidal-street, the architects asserting that the surveyor gave incorrect information over the telephone, and the surveyor denying having done so.

Practically speaking, these two discrepancies appear to be the source of all the trouble that has arisen.

The architects and surveyor held several conferences and proceeded to and did make adjustments and amendments to the plans, amongst others in altering some of the blocks by taking therefrom certain lots on the west of Tashmoo-avenue and adding to the blocks on the east side, and it was during the period of these alterations and adjustments that a vigorous campaign of selling from the sales plan was entered upon by the owners, and they allege that it was not until the March following that they discovered the errors and mistakes and brought them to the attention of the architects and surveyor.

Conferences were held, at which Howard, who acted for the owners throughout and I find to some extent was conversant with the work as it progressed, Hall, who had complete charge of the work in the architects' office, and the surveyor, were present, at which it was agreed to remedy the discrepancies — a portion of the property was to be restaked and blocks were to be rechecked. The architects amended their plan, and the surveyor restaked certain portions of the property and registered his plan, after which the owners, appearing to be satisfied, proceeded with the selling. The surveyor's account was paid in full without



objection, and the architects' account was all paid excepting the sum now claimed, which the owners refused to pay because of the errors, mistakes, and damage alleged to have been suffered, and this litigation followed.

The owners state that the plans are useless, that they have encountered many difficulties and expenses with the purchasers, because the lots described in the sale agreement were not in the same location or size, or fronting on the same streets, as shewn in the sales plan, and in consequence they have been obliged to return purchase-money, cancel contracts, make adjustments, and also because of this state of affairs the architects and surveyor had between them held many conferences and much time was expended in correcting, adjusting, and amending the plans, for all of which they have been charged, and that as to these charges there must be a return.

The evidence at the trial was voluminous, but the foregoing outline is, I think, a sufficient reference to enable the points at issue to be understood and determined.

Counsel for the surveyor contends that there is no privity of contract between the owners and the architects with reference to any charges made for the traverse measurements; that the architects are to blame for all the mistakes; and that, in any event, the owners at the conference in March, 1925, settled all existing differences. I dispose of this contention by holding that the evidence is conclusive that the owners did employ the surveyor and agreed to pay and did pay him for all his services in connection with the traverse measurements, sketches, etc.

For the owners it is contended that the surveyor and architects did not exercise that reasonable care and skill they should have, and in consequence the owners have suffered and will suffer seriously by the purchasers insisting on a return of moneys paid on contracts for sale, in the cancellation of contracts, and in the expense incurred and to be incurred in making adjustments with purchasers; and also that the moneys paid to the surveyors, \$7,891.65, should be repaid or so much thereof as will compensate the owners for all damages suffered and to be suffered.

Counsel for the architects urge that, if any mistakes or errors were made, and if the owners are found entitled to any damages, or to a return of moneys, it is due entirely to default on the part of the surveyor in not exercising care and skill in his work. That mistakes and errors were made there can be no doubt; and the question for determination therefore is, if any liability is found

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to exist, upon whom does it rest, the architects or the surveyor?

The liability of professional men for not exercising care and skill is a question of fact and must be determined by a consideration of all the surrounding circumstances.

I do not find that there were any unusual circumstances other than that the area for subdivision was a very large one and in many places covered with brush and other obstructions, and that the owners were in a hurry to place the lots on the market.

The law applicable is, that an architect or a surveyor is in the same position as any other professional man or skilled person; and, whether it is in the preparation of plans or specifications or the doing of any other professional work for reward, he is responsible if he omits to do it with an ordinary and reasonable degree of care and skill. See *Badgley v. Dickson* (1886), 13 A.R. 494, and *Russell v. McKerchar* (1905), 1 W.L.R. 138; Hudson on Contracts, 5th ed., pp. 27, 28, 3rd ed., p. 40; and Beven on Negligence, 4th ed., p. 1322.

In *Township of Stafford v. Bell* (1880-81), 31 U.C.C.P. 77, and 6 A.R. 273, an action against a surveyor for negligence in making an improper survey, Osler, J., 31 U.C.C.P. at p. 85, says:—

“The defendant in this case is held to just the same degree of diligence as attorneys, surgeons, and other skilled workmen or professional men in their respective employment.”

Wilson, C.J., at p. 106, said:—

“The first duty of the surveyor who is going over old work is to discover what the original was, and not to undo what has been done by his predecessor if he can discover what it is that was done. And when he has discovered it, he must make his work conform to it.”

As to the damage suffered see Hudson on Building Contracts, 5th ed., p. 27:—

“Where negligence and the omission to use due care and skill have been made out, the amount of damages that can be awarded is to be measured by the consequent loss to the employer, and it is immaterial that such damages may exceed the amount of the commission or fees agreed to be paid to the person employed for the performance of his duties.”

In *Monney Penny v. Hartland* (1824), 1 C. & P. 352, it was decided that a surveyor should not without careful examination rely on the work done or information given by others.

I shall first dispose of the architects' claim of \$4,875.05. Before action, statements shewing the items representing this sum were, I find, repeatedly rendered to and never disputed by the owners. It was said by counsel for the owners that the architects gave an estimate of \$3,000 (see letter of the 11th July, 1924, exhibit 12), but I find that that estimate had reference only to the work then under way and did not include, and was never intended to include, the preparation of the detailed plans, the advertising, and the services subsequently required of the architects and by them rendered.

In these circumstances, there will be a finding in favour of the architects for the amount sued for.

It is now convenient to consider the important questions, whether any or what claim for negligence or lack of skill can be laid at the door of the surveyor and the architects, or either, and if so the damages sustained. One of the objections raised by learned counsel for the surveyor was that the lands were covered with brush and other obstructions. If so, and the surveyor could not proceed with safety and obtain accurate information, it was his duty to have notified his employer or to have stated in his report to the architects that there might be discrepancies. It may be that such obstructions would make more difficult the staking out of the lots upon the ground, but with an outline survey completed, so far as the plan and its accuracy is concerned, the fact that the land was covered with brush or other obstructions would, in my mind, present no difficulty in the way of an experienced and skilful surveyor.

In the present case, as stated, the architects' advice was sought by the owners, and they were engaged to propound a general town planning scheme and to prepare a tentative street and block plan, and to do this they had to locate the proposed streets and the dimensions of the blocks and lots, and also, as stated, the surveyor was engaged by the owners to render such services as the architects might require in the preparation of the street and block plan, and was subsequently engaged by the owners to stake out the lands and prepare final plans for registration.

I can see no reason why, if the surveyor followed the usual practice of carefully examining the lands in question, the title-deeds, the descriptions, and registered plans of the adjoining lands and subdivisions, locating the boundaries and ascertaining by calculation the angles and measurements, there should be any difficulty in the way of the architects preparing with reasonable

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1928. way of the surveyor, with the architects' plan in his possession,  
HARRIES if drawn to scale with accuracy, preparing an accurate plan con-  
HALL forming therewith, shewing the dimensions of every block and  
& KRUSE lot and angle throughout the subdivision before proceeding to  
v. stake out the subdivision or any part of it upon the ground.  
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What mistakes did the surveyor make? I find the following:—

(a) In giving to the architects the wrong location of the south side of St. Clair-avenue.

(b) In producing St. Clair-avenue westerly from the Scott-road to the west side of Vidal-street, he incorrectly gave the angle as being  $61^{\circ} 21'$ .

(c) To tie up the subdivision with the City of Sarnia he gave the angle of the intersection of the south side of St. Clair-avenue, in Sarnia, with the west side of Vidal-street, as a  $90^{\circ}$  angle. This was not correct.

(d) By proceeding to stake out the subdivision before an accurate plan was prepared and before all the measurements and dimensions of lots, blocks and streets were checked by calculation.

(e) By proceeding to stake out the property without first laying out sufficient base lines on the subdivision so as to check or eliminate possible errors in measurement on the ground.

These findings are supported by the expert witnesses called, namely, A. S. Code, O.L.S., A. T. Ward, O.L.S., and Rolfson, O.L.S. (the surveyor's own witness), all of whom swore that in their opinion it was in consequence of these mistakes that all the trouble has arisen, and that the mistakes were contributing causes for the differences shewn in the selling plan and the registered plan.

The incorrect location of the south side of St. Clair-avenue, I find, was caused by the surveyor, instead of examining the descriptions, the plans of the adjoining subdivisions, and locating the true monuments, accepting as accurate a stake planted on the bank as the correct angle-stake of the intersection of the south side of St. Clair-avenue with the west side of Scott-road, and accepting another stake which apparently was some 17 feet south of the true line. This error or mistake and the erroneous angles given, for which I can find no excuse, resulted in making it impossible for the architects in the preparation of their



plan to locate with accuracy the intersection of Tashmoo-avenue with Vidal-street.

I think these errors and the staking out of the streets before the plan was properly prepared, with all the angles and measurements accurately calculated as stated, are primarily responsible for all the trouble that subsequently developed. I do not think it necessary to set out in detail in what respect the registered plan, prepared by the surveyor, differs from the sales plan, prepared by the architects, as these differences are all shewn on another plan (exhibit 17), and can, when and if necessary, be referred to and understood. But, even if all these mistakes were made, are either the architects or the surveyor to blame? The difficulty that I see in the way of the owners succeeding, in so far as their claim is for damages caused by cancellation of agreements by purchasers, return of moneys and adjustments, etc., is that they were, as stated, unquestionably in a hurry to get the lots to the public, the sales-campaign was in active preparation, and, as sworn to by Howard, that campaign was to stretch from the Gulf of Mexico to the Arctic Circle and from coast to coast.

The evidence, I think, is that the owners, upon the failure to obtain the surveyor's consent to the preparation of a sales plan before he staked out the property, appealed to the architects to do so and they did so, but at the same time I find that the owners were cautioned both by surveyor and architects that it would be a risky piece of business to sell lots from such a plan, as discrepancies were likely to appear later on. If the owners had consulted their solicitor, he would have told them that some of the risks were:—

(1) Discrepancies by deviation in the measurements and dimensions of the lots.

(2) Failure to obtain consent to the registration of the plan by parties interested, such as mortgagees, and others.

(3) Refusal of the registrar to accept the plan for registration.

(4) Possible failure of the Town Planning Commission to affix seal and approval because the plan did not agree with the plan originally submitted for approval.

(5) Refusal of the Railway Board or of interested municipalities to assume liability for construction of roads or otherwise in the subdivision.

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Now, what occurred was that, after many sales were made, discrepancies were discovered between the sales plan and the registered plan, and, as stated, the alleged troubles arose. In these circumstances, how can it be successfully argued that either the surveyor or the architects should be made liable in damages for negligence grounded on lack of professional skill? In my opinion, the fault was entirely that of the owners in proceeding to sell lots before the final plan had been prepared, checked, and registered. The surveyor's story—and his evidence is not contradicted by Howard—is that during the period of staking he repeatedly told Howard how he was progressing and the difficulties he was encountering, and particularly in the business section of the subdivision, and he even prepared a sketch to shew him what the troubles were, and yet there does not appear to have been any cessation on the part of Howard of his efforts to sell, and, if I am not mistaken, Howard swore that he did know of some of the discrepancies in the plans before and after he had disposed of a considerable number of lots.

I think a fair inference from the evidence as to what took place at the conference in March, 1925, when all the difficulties that had arisen appear to have been discussed and adjusted, is that Howard must have felt he was at fault in proceeding to sell before all the work was done and the final plans prepared. If Howard considered that either the architects or the surveyor or both were at fault, and had decided to hold them liable in damages for any loss he had sustained in consequence of the purchasers cancelling their contracts, return of moneys or any adjustments made or to be made, how is it that without objection he continued to make payments to the architects on account and paid the surveyor from time to time thereafter every dollar he owed him not only for the work which he had done prior to March, 1925, but for the many services performed thereafter at the express request of the owners?

My conclusion is that neither the architects nor the surveyor are liable to the owners for any damage they have sustained or will sustain in the cancellation of agreements of sale, return of moneys, and the cost of adjustments, etc.

There remains to be disposed of the further question of damages resulting from the errors and mistakes made, as indicated, by the surveyor—as I am unable to find that the architects were guilty of any negligence or want of professional skill. It was not their duty to go upon the grounds and inspect the accuracy of the staking thereon by the surveyor, because they were entitled

to rely on the accuracy of the surveyor's reports and to believe that the staking was in accordance with their plans.

Unquestionably, large sums were charged by the architects and surveyor for the extra work done in re-staking certain sections, making modifications, adjustments, and amendments to the plans, all, or nearly all, of which I find were caused by the mistakes and errors of the surveyor, and I see no just reason, legal or equitable, why the owners are not entitled to relief.

It was argued by learned counsel for the surveyor that the owners, at the March, 1925, conference, waived all claims to damages, but I cannot find in my notes taken at the trial that there was any discussion as to the damage suffered or to be suffered, and the fact is that many charges relating to these errors or mistakes were made prior and subsequent thereto.

The plan as amended and registered is not useless as contended by learned counsel for the owners, and I see no reason why sales may not be made with safety from it in the future.

The results of my conclusions are:—

(1) That the architects, Harries Hall & Kruse, are entitled to judgment against the owners, the South Sarnia Properties Limited, for \$4,875.05, and costs.

(2) That the owners, the South Sarnia Properties Limited, are not entitled to any damages resulting from the sales of lots as claimed.

(3) That the owners are entitled to damages against the surveyor (Baird), and the amount of these damages shall be determined by the Local Master at Sarnia, to whom a reference is directed, the reference being confined to the value of the architects' and surveyor's services in the extra work done by them in connection with the re-checking, re-staking, amendments, modifications, and re-drawing of plans, caused by the mistakes and errors of the surveyor, and judgment will be entered for whatever sum the Local Master finds, including the costs of reference and costs of action, other than any costs relating solely to that part of the action in which the plaintiffs failed to recover.

Baird & Baird, the defendants in the second action, and the South Sarnia Properties Ltd., the defendants in the first action and plaintiffs in the second, appealed from the judgments of FISHER, J.

February 11, 12, and 13. The appeals were heard by MULOCK, C.J.O., MAGEE, HODGINS, and MASTEN, J.J.A.

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*J. H. Rodd, K.C., and F. K. Jasperson*, for the appellants the Bairds. The evidence shews that only two errors were made by the surveyor, i.e., firstly, in the angle of the production of St. Clair-avenue, and secondly in locating it too far south. The learned trial Judge erred in finding that these two errors or either of them caused any material damage to the owners. The error in the angle was discovered and corrected before the "first sales plan" was prepared by the architects, and the wrong angle never appeared on any plan used by the owners. The learned trial Judge also erred in awarding to the owners as damages the cost of the preparation of the new plans necessitated by the error in locating St. Clair-avenue too far south, because new plans had to be prepared in any event following the decision of the owners to widen St. Clair-avenue. The learned trial Judge erred in finding that the staking was proceeded with by the surveyor too soon. The evidence shews that this work was done only after instructions were received from the architects. The account of the surveyors was paid by the owners two years before, and no complaint was ever made until this action was brought against the owners by the architects. In any event, negligence on the part of professional men, to be actionable, must be gross. Reference to *Township of Stafford v. Bell* (1881), 6 A.R. 273; *Hart v. Frame* (1839), 6 Cl. & F. 193; *Lanphier v. Phipos* (1838), 8 C. & P. 475; Beven on Negligence, 4th ed., vol. 2, p. 1323; The Surveys Act, R.S.O. 1927, ch. 202, sec. 13.

*T. N. Phelan, K.C.*, for the appellants the South Sarnia Properties Ltd. The errors committed by the surveyor fall into two classes: first, the measurements and angles furnished to the architects for the purpose of preparing the sales plan; second, the failure to follow the sales plan in the superimposing of the plan on the ground. In order to obtain the approval of the Railway Board the plan had to be "tied up" with the Town of Sarnia and adjoining municipalities, i.e., the existing streets had to be carried across Vidal-street at the same angle into the new subdivision. In spite of the errors in the angles, the plan could have been staked out properly had the instructions of the architects been carried out, by pivoting the whole plan and re-arranging the lots within its boundaries. Instead of this, the surveyor proceeded with the staking without reference to the plan. Both the surveyor and the architects are responsible for the trouble in which the owners now find themselves. The sales plan was furnished to the owners for a definite purpose. Both the surveyor and the architects knew of this purpose, and it was the duty of both to use at least reason-



able care to see that the owners obtained something which could be so used. Of the original cost of preparing the plans the evidence shews that 80 per cent. was lost because of the errors made. The learned trial Judge was right in awarding the owners the cost of restaking and resurveying. He erred, however, in not awarding damages for the cancellation of contracts and trouble with the owners due to the incorrectness of the sales plan. As far as the architects are concerned, it was their duty to design the subdivision and to supervise the laying of the plan on the subdivision. In this they were negligent and should be held liable for the damages resulting therefrom.

*J. A. Rowland*, K.C., for Harries Hall & Kruse, respondents. The evidence shews that the plan prepared by the architects could have been staked on the ground with the exception of a modification in the location of St. Clair-avenue, rendered necessary by the mistake of the surveyor. The failure to stake was entirely because the surveyor disregarded the instructions on the plan. The architects did not claim to be surveyors. As the work progressed, the surveyor called the architects' attention to certain discrepancies. These were corrected. The architects were entitled to assume that, apart from the discrepancies pointed out, the information furnished by the surveyor was correct and could be relied on. The architects' duty with regard to the staking was to "supervise" only in the sense of consulting with the surveyor when difficulties arose and not actually to superintend and check over the work of the surveyor.

March 18. The judgment of the Court was read by MASTEN, J.A.:—These are appeals from judgments of Mr. Justice Fisher pronounced by him on the 1st day of October, 1928, after a trial before him without a jury. The actions were tried together, and the appeals before this Court came on to be heard together.

The result of the conclusions of the trial Judge is stated by him in his reasons for judgment, *supra*.

After hearing an exhaustive argument of the case, and after a perusal and consideration of the evidence and exhibits, I am of opinion that the judgment of the learned trial Judge, whereby he finds that the architects, Harries Hall & Kruse, are entitled to judgment against the owners, South Sarnia Properties Limited, for \$4,875.05, and costs, is supported by the evidence and should be affirmed. The services were unquestionably performed at the request of the owners, South Sarnia Properties Limited, and if there was neglect or failure to exercise reasonable care and skill on the

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part of the plaintiffs, that forms properly the subject of a counterclaim.

The defendants South Sarnia Properties Limited, by their affidavit of merits, raise a counterclaim against the plaintiffs on the ground of their failure to exercise reasonable skill which they ought to have exercised as landscape architects and engineers in the performance of their professional duties, and this counterclaim was dismissed by the learned trial Judge.

Upon the best consideration that I can give to the matter, I am of opinion that there is a sufficient basis raised in the evidence to indicate in some degree a breach by the plaintiffs of their implied obligation as professional men undertaking the duties which they here undertook for the defendants, and that the finding of the learned trial Judge dismissing the counterclaim of the defendants should be reversed, and there should be a declaration that the defendants are entitled to recover on their counterclaim.

At this juncture I say nothing whatever as to the amount of that recovery, but shall refer to it again at a later stage of this judgment.

In the action of South Sarnia Properties Limited against Baird & Baird, I again agree with the finding of the learned trial Judge that Baird & Baird failed in the duty which they had undertaken to perform on behalf of the plaintiffs, and have rendered themselves liable for failure to exercise reasonably the professional skill which they ought to have brought to bear, and which it was their duty to bring to bear upon the work undertaken by them, and that the plaintiffs are entitled to recover from them the damages which are attributable to their default.

It is scarcely necessary to indicate that the plaintiffs are not entitled to any double recovery. The whole of the damages which they have suffered ought to be ascertained, and in ascertaining such damages all the various items upon which their claim is based may be taken into account. I am of opinion that the trial Judge was in error in dismissing the plaintiffs' claim for damages caused by the cancellation of agreements of sale and readjustments with purchasers, etc.; but, in estimating the damages throughout, regard must be had by the tribunal assessing such damages to the instructions, directions, and attitude of the South Sarnia Properties Limited, as communicated by that company to the architects and to the surveyor.

When the total damages suffered by the South Sarnia Properties Limited have been ascertained, these damages should then be apportioned between the architects and the surveyors in such pro-

portions as the tribunal assessing the damages may deem fair and just, having regard to all the surrounding facts and circumstances.

In considering the case I have arrived at the conclusion that the situation is peculiarly one in which the damages recoverable by the South Sarnia Properties Limited can best be ascertained and determined by a jury, and I have considered, in that connection, the jurisdiction of a Divisional Court to direct that such damages be assessed by a jury.

In my opinion, a Divisional Court has such jurisdiction. By the Ontario Judicature Act, R.S.O. 1927, ch. 88, sec. 11, it is provided that the Appellate Division shall exercise that part of the jurisdiction vested in the Supreme Court which, on the 31st day of December, 1912, was vested in the Court of Appeal, and in the Divisional Courts of the High Court, and such jurisdiction shall be exercised by a Divisional Court of the Appellate Division and in the name of the Supreme Court.

The jurisdiction exercisable by the old Court of Appeal appears from sec. 52 of the Judicature Act, R.S.O. 1897, ch. 51:—

“The Court of Appeal shall have power to dismiss an appeal, or give any judgment and make any decree or order which ought to have been made, and to direct the issue of any process, or the taking of any proceedings in the Court below, or to award restitution and payment of costs, or to make such further or other order as the case may require.”

In addition I refer to sec. 26 of the present Judicature Act, which reads as follows:—

“The court upon an appeal may give any judgment which ought to have been pronounced and may make such further or other order as may be deemed just.”

These provisions of the statutes appear to me to confer ample power upon this Court to direct that such damages as the South Sarnia Properties Limited may be entitled to recover shall be assessed by a jury, and I would therefore so direct.

I would therefore vary the judgment in the case of *Harries Hall & Kruse v. South Sarnia Properties Ltd.*, by declaring that the defendants are entitled to a recovery on their counterclaim against the plaintiffs, in accordance with the directions hereinbefore contained, and in the action of *South Sarnia Properties Ltd. v. Baird & Baird*, by directing that the plaintiffs do recover all damages to which they may be entitled, having regard to the directions hereinbefore contained; that, for the purpose of ascertaining the damages which are recoverable, the two actions go

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down for hearing together, and the damages be assessed by a jury, having regard to the directions hereinbefore contained.

The South Sarnia Properties Limited will be entitled to the costs of this appeal in any event at the conclusion of the action.

*Judgment below varied and assessment of damages by a jury directed.*

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[APPELLATE DIVISION.]

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TURVILLE V. MALLOY.

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*Division Courts—Attachment of Debts—Priorities of Garnishing Creditors—Claim to Attach Estate Moneys in Hands of Administrator—Primary Debtor Entitled to Distributive Share—Payment into Court—Earlier Claim but upon Administrator in Personal Capacity—Amendment—Non-retroactivity—Provisions of Division Courts Act.*

K., administrator of the estate of a deceased person, had in his hands moneys of the estate, a distributive share of which M. as one of the next of kin was entitled to receive. On the 24th August, 1928, J., a creditor of M., caused to be issued from a Division Court a garnishee summons (before judgment) claiming to recover from M. \$293.75, and on the 25th August served the summons on K., who was named as garnishee. On the 4th September, 1928, T., another creditor of M., issued a similar summons, claiming to recover from M. \$314.58, and served it on K. on the 6th September, 1928. In T.'s summons K. was described as "administrator of the estate" of the deceased; but in J.'s summons simply as "K." K. admitted that M. was entitled to receive \$391.12 out of the estate moneys in his hands, and paid that sum into court. The two cases came on together for trial in the Division Court, when the Judge amended J.'s summons by adding after K.'s name the words "administrator of the estate of" the deceased; and gave judgment declaring that J. was entitled to payment of her claim out of the money in court in priority to the claim of T.:—

*Held*, on appeal, by the majority of the Court, that the Judge had no power to give retroactive effect to the amendment, and thus give J., on the basis of his earlier service, priority over T.

The service upon K. was in his personal and not in his representative capacity, and was not effective to attach the moneys in his hands as administrator.

*Stevens v. Phelps* (1875), L.R. 10 Ch. 417, applied and followed.

Sections 89 (4), 141, 148, 150, and 165 of the Division Courts Act, R.S.O. 1927, ch. 95, considered.

*Per* MAGEE, J.A. (dissenting):—Nowhere in the Division Courts Act or Rules is a primary creditor required to state the nature of the debt which he seeks to attach or the character or capacity, representative or otherwise, of any party. If there was an attachable debt, it was attached by the service upon K. of J.'s summons.



AN appeal by Edith M. Turville, primary creditor in a Division Court garnishing plaint, from the judgment of the Third Division of the County of Perth declaring that Joseph Kelly, the primary creditor in another garnishing plaint, was entitled to be paid the amount of his claim, in priority to the appellant, out of moneys paid into court by the garnishee, James Kelly. Mary Malloy was the primary debtor in both plaints, and James Kelly was the garnishee in both, but in the Turville plaint James Kelly was made garnishee in his capacity of administrator of the estate of Mary A. Kelly, deceased, and in the Kelly plaint he was made garnishee apparently in his personal capacity, no reference to his capacity of administrator being made. The facts are fully stated in the judgments, *infra*.

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February 14. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and FISHER, JJ.A.

*R. L. Kellock*, for the appellant. The Judge in the Division Court erred in amending the summons in the Kelly plaint by adding words describing James Kelly as administrator and assuming to make the amendment relate to the date of the service on the garnishee in his personal capacity. No money of the estate of Mary A. Kelly was attached until the amendment was made, for there could be no attachment of the estate moneys by service on the garnishee in his personal capacity only. The amendment was necessary, but, under sec. 138 of the Division Courts Act, R.S.O. 1927, ch. 95, the Judge had no power to date back the amendment to the day of service so as to affect rights which had been acquired in the meantime. Reference to *Re Orr v. Krepsky* (1925), 57 O.L.R. 353, at p. 356; *Stevens v. Phelps* (1875), L.R. 10 Ch. 417; *Strong v. Culver* (1919), 45 D.L.R. 542; *Sewrey v. Burk* (1896), 16 C.L.T. Occ.N. 322; *Bicknell & Seagar's Division Courts Manual*, 4th ed., p. 351; 28 *Corpus Juris*, p. 207; *Gooderham v. Moore* (1899), 31 O.R. 86; *Anlaby v. Prætorius* (1888), 20 Q.B.D. 764, at pp. 769, 770.

*G. T. Walsh*, for Joseph Kelly, respondent. Under the Division Courts Act there is no requirement that the capacity of the garnishee shall be specified in the garnishee summons. It was not necessary to make the amendment, but the fact that the amendment was made does not prejudice the rights of the garnishor. Section 141 refers to all debts owing by the garnishee. This must include debts owing in other than his personal capacity. In any event this is merely a matter of form, and sec. 219 provides that no proceedings shall be quashed or vacated for any matter

App. Div. of form. Reference to *Challinor v. Roder* (1885), 1 Times L.R.  
1929. 527; *Petty v. Daniel* (1886), 34 Ch.D. 172.

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March 18. The judgment of the majority of the Court was read by MULOCK, C.J.O.:—The sole question involved in the appeal is, which of two primary creditors, Edith M. Turville or Joseph Kelly, is entitled to a prior lien on the sum of \$391.12 to which the primary debtor Mary Malloy was entitled as next of kin of one Mary A. Kelly, deceased, and of whose estate the defendant James Kelly was administrator.

The facts are as follows. On the 24th August, 1928, Joseph Kelly, primary creditor, caused to be issued a summons (before judgment) against Mary Malloy, primary debtor, and "James Kelly" garnishee, claiming from the primary debtor \$293.75, which summons on the 25th August, 1928, was served on James Kelly.

On the 4th September, 1928, Edith M. Turville, another primary creditor of Mary Malloy, caused to be issued a summons (before judgment) against Mary Malloy, primary debtor, and James Kelly, administrator of the estate of the late Mary A. Kelly, deceased, as garnishee, claiming from the primary debtor the sum of \$314.58, which last mentioned summons was served on James Kelly on the 6th September, 1928. To these two summonses the garnishee filed a notice stating that he was not indebted to the plaintiff Joseph Kelly in any sum, but that, as administrator of the estate of the late Mary A. Kelly, deceased, he held for distribution certain funds of the estate, to a portion of which, namely, the sum of \$391.12, Mary Malloy was entitled and which sum he brought into court to be disposed of by the court.

On the 15th October, 1928, Joseph Kelly in his action gave notice to the clerk of the court and to the garnishee that he claimed against the garnishee in his capacity as administrator of the estate of the late Mary A. Kelly, deceased, and that application would be made before his Honour at the trial "to amend the summons and claim accordingly."

As respects the claims against the garnishee, the two cases came on for trial and were tried together at the sittings of the court held on the 1st November, 1928, when the learned trial Judge, on the application of Joseph Kelly, amended the summons in his action by adding after the words "James Kelly" the words "administrator of the estate of the late Mary A. Kelly, deceased," and he gave judgment declaring that Joseph Kelly

was entitled to payment out of the moneys paid into court by the administrator, in priority to the claim of Edith M. Turville. In his reasons for judgment, the learned Judge said: "We have established the rule in Stratford 'first come first served,' and where there are a number of garnishees that has always been the rule, 'first come first served,' that has always been the rule, so that the claim that is first served would come first, and the claim next served comes next, and the claim third served comes in third upon the moneys in the hands of the garnishee." By what authority the rule cited by the learned Judge has been established as the law in Stratford does not appear. There is not one law in Stratford and a different law throughout the rest of the Province. The rights of the parties must be determined in accordance with the law of the Province.

The first question to determine is, whether the moneys in the hands of James Kelly as administrator of the estate of Mary A. Kelly, deceased, and to which the primary debtor was entitled, were attachable by Joseph Kelly in his action, wherein, at the time of the service of the summons upon James Kelly, garnishee, he was described simply as James Kelly, garnishee, and not in his representative capacity.

In *Stevens v. Phelps*, L.R. 10 Ch. 417, a garnishee order *nisi* was obtained by a judgment creditor against Richard Stevens and Maria Phelps, who were the executors of A. R. Phelps, ordering that all debts owing from the garnishees to the judgment debtor should be attached to answer judgment. It did not appear on the face of the garnishee order that the garnishees were executors of A. R. Phelps, the order being made against them personally. Mellish, L. J., delivering the judgment of the Court, said: "Assuming that a garnishee order can be obtained against executors in respect of a debt due from their testator, I think it ought to shew on the face of it that it is directed to them as executors and not personally. In the present case the order professes to charge them personally. An order must be made according to the summons."

This view is equally applicable where the garnishee is, as here, administrator. It commends itself to me and should be followed. Further, the spirit of the Division Courts Act is in harmony with that view.

James Kelly, being garnishee personally, in the event of his offering no defence the Judge might give judgment against him personally (sec. 148 of the Division Courts Act and form 4), and the execution to enforce the summons would be against his

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C.J.O. I am of opinion that the service upon James Kelly on the  
25th August, 1928, of the summons and garnishee notice was in-  
operative to attach the moneys in his hands as administrator of  
the intestate.

The next question is: Had the learned Judge power to give  
retroactive effect to the amendment in question and thereby give  
Joseph Kelly priority over Edith M. Turville?

On the 6th September, 1928, the moneys in question were  
effectively attached at the instance of Edith M. Turville in her  
action, wherein the garnishee was described as "James Kelly,  
administrator of the estate of the late Mary A. Kelly, deceased."  
The amendment made in the action of Joseph Kelly on the 1st  
November, 1928, by describing the garnishee as administrator,  
etc., substituted as garnishee James Kelly, administrator, etc.,  
for James Kelly personally; then for the first time the estate  
through its administrator became a party and, *quoad* the estate,  
the proceedings were then for the first time deemed to have been  
commenced against the estate (the Division Courts Act, sec. 89,  
subsec. 4). But prior thereto the service of the summons in  
Edith M. Turville's action upon the garnishee had given her a  
statutory first lien on the fund (secs. 141, 150), and the learned  
Judge had no power to disregard the statute and make the amend-  
ment retroactive to her prejudice. Therefore this appeal should  
be allowed.

If the debtor's interest in the estate of the intestate had  
remained a distributable and unascertainable share, it would not  
have been attachable by garnishee proceedings; but, the administra-  
tor having admitted unqualifiedly that she is entitled to the moneys  
which he has paid into court, they were, I think, attachable.

The judgment below should be set aside and the appropriate  
judgment against a garnishee entered in favour of Edith M.  
Turville with costs throughout.

The plaintiff Joseph Kelly must be made primarily liable for  
all the costs occasioned by his claim to priority over Edith M.  
Turville, including the costs of this appeal, and if not recovered  
from him personally the same should be added to her claim and  
paid out of the fund in court. The plaintiff Joseph Kelly to be  
entitled to any balance on account of his judgment.

MAGEE, J.A. (dissenting):—In this appeal from the judgment  
of the Third Division Court of the county of Perth, the plaintiff



Edith M. Turville claims that her judgment against the defendant Mary Malloy for \$314.56 should be paid in full out of the \$391.12 in court, in priority to the judgment of Joseph Kelly against the same defendant for \$292.75, which the trial Judge directed to be paid first in full.

The appellant and Joseph Kelly each sued Mary Malloy for those respective amounts—Joseph Kelly's action being brought on the 24th August, 1928, and the appellant's on the 4th September, 1928. Each action was brought in the Third Division Court, and was commenced by summons, under sec. 147 of the Division Courts Act (in form 4, summons in garnishee proceedings.) In the first action Joseph Kelly was named as primary creditor, Mary Malloy as primary debtor, and James Kelly as garnishee. In the second action the appellant was named as primary creditor, Mary Malloy as primary debtor, and "James Kelly, administrator of the estate of Mary A. Kelly, deceased," as garnishee.

The summons was served on James Kelly in the first action on the 25th August, and that in the second action on the 6th September. Each summons gave particulars of the claim against the primary creditor, but neither of them stated the nature of the debt owing by the garnishee to the primary debtor, except that the appellant's summons claimed "to attach in the hands of the garnishee as administrator of that estate an amount sufficient to cover the amount of the claim."

On the 9th October, the garnishee filed one notice, entitled in the style of cause of both actions, stating that in Joseph Kelly's action he was not indebted to the primary debtor in any sum, but that, as administrator of the estate, "he has on hand for distribution certain funds of the estate of which the primary debtor Mary Malloy is entitled to \$391.12;" and he brought that sum into court to be disposed of by the court in the above named action. On the 17th October, Joseph Kelly gave notice to the clerk of the court and to the solicitors for James Kelly and Mary Malloy that he claimed against James Kelly in his capacity as administrator, and would apply at the sitting of the court to amend the summons and claim accordingly.

It is admitted that Mary Malloy was one of the next of kin of Mary A. Kelly, who had died intestate on the 15th August, 1926, and that letters of administration of her estate were granted to James Kelly. It is also admitted that Mary Malloy, at the commencement of this action, "was entitled to receive" from him as administrator \$391.12. Presumably, Mary Malloy was not a

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creditor of Mary A. Kelly or her estate, but only entitled as one of the next of kin in the distribution.

Both actions came on for trial at the sitting of the court on the 1st November. Apparently, Kelly's action was heard and disposed of first. The amendment was asked and allowed and judgment was given for him against Mary Malloy for the amount of his claim—and against the appellant's contention it was ordered that his judgment should be paid in full out of the money in court. In the appellant's action she obtained judgment against Mary Malloy for the amount of her claim with an order for payment thereon of the balance in court after paying Joseph Kelly's judgment.

The appeal is upon the ground that Joseph Kelly's summons, not having described James Kelly as administrator, could not bind moneys in his hands as administrator, and that the appellant's action in which he was described as administrator was really the first effectual attaching summons, and therefore her judgment obtained thereon should have priority.

The material parts of the Division Courts Act which need to be referred to are: sec. 138, allowing debts "owing or accruing" to be attached; sec. 147, allowing issue of garnishing summons before judgment against the primary debtor; form 4 of garnishing summons and style of cause and warnings 7, 8, 9, to garnishee thereon—sec. 149; sec. 148, as to judgment in the prescribed form; sec. 154, allowing adverse claims to be dealt with as justice may require; sec. 150, as to service of the summons having the effect of an attaching order; and secs. 140, 141, 142, as to the effect of an attaching order, and the affidavit for obtaining it. Suffice it to say that nowhere in the Act or in the Division Court Rules is a primary creditor required to state in any way the nature of the debt he seeks to attach or the character or capacity, representative or otherwise, of any party—only the names of the parties are required, and the effect is to attach "debts owing or accruing" to the primary debtor.

The warning is that he must not pay the primary debtor any "debt owing or accruing" from him to that primary debtor. It is only "debts owing or accruing" which can be attached.

Now, even in the Superior Courts it is not required that the representative character of any of the parties shall be stated in the style of cause. The old practice is thus stated in Chitty's Forms (11th ed., 1879), p. 54 (note): "The character in which the defendant is sued, as when he is sued in *autre droit*, as executor, administrator, or the like, need not be stated in the title,

though it is better and usual that it should be . . . . The App. Div.  
character in which the defendant is sued should not be stated in 1929.  
the body of the writ . . . . . It is, however, necessary that  
the character in which the defendant is sued should appear in the  
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Similarly at p. 53, note—as to the character in which the plaintiff sues.

So, in Archbold's Practice (13th ed., 1879), p. 1006, as to proceedings against them: “Executors or administrators need not be described as such in the body of the process.”

In England by Order 3, Rule 4, the representative character of plaintiff or defendant is to be shewn in the endorsement of the writ, and by our General Rules of 1928, Rule 4, the writ is to contain the characters in which the parties sue or are sued.

But these are specific provisions changing the former practice, and do not apply to the Division Courts. As only the names are called for by the Act, and no statement whatever of the nature of the alleged debt is required, it remains for the primary creditor at the trial to prove the debt and the capacity in which it is owing.

Now, was there a debt in this case which was attachable? No action lies against an executor or administrator for either a legacy or a distributive share of the estate, although he may have expressly promised to pay: Williams on Executors (11th ed., 1921), p. 1548. In Bullen & Leake's Precedents (2nd ed., 1863), pp. 38 and 39, it is said: “A trustee who has received trust-money is accountable for it to the *cestui que trust* in the Court of Chancery, but in the courts of law he is treated for most purposes as the absolute owner, and no action can in general be maintained by the *cestui que trust* against him. . . . . If, however, he admits to the *cestui que trust* that he holds such money as the money of the *cestui que trust* to be accounted for to the latter, he is debarred from setting up his character of trustee, and becomes liable at law to the *cestui que trust* for money received to his use . . . . . An executor or administrator is in the position of a trustee, and the legacies or distributive shares payable out of the estate of the deceased cannot be recovered at law as debts . . . . . But after an executor has admitted to the legatee that he has received the money and holds it to his use, the legatee may recover it in this action”—that is an action for money received.

If the executor has thus made himself liable to be sued for the legacy or share, the action for money received would be a personal action against him. It would be his “debt.” If his debt,



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then the summons against him would properly be against him personally, although he might still be liable to all remedies in equity—and although he might be described as administrator.

It is to be remembered that no debt was owing to Mary Malloy from the deceased Mary A. Kelly. If she were a creditor of the latter, then a debt would still exist. But there is no “debt” to the next of kin unless the administrator has so rendered himself personally liable. So that the appellant is in this dilemma—either there was a debt from the administrator personally or there was no debt at all. If there was a debt, Joseph Kelly was first in attaching it. If there was none, the appellant has not in this her own action any ground of appeal, for she has obtained more than she was entitled to. Neither Joseph Kelly nor she would in that case be entitled to recover anything against the garnishee. If his payment into court is the first acknowledgment of the right of Mary Malloy to the money, it is several weeks after both actions were begun against him and cannot relate back so as to entitle either. But if, as is perhaps more probable, he had admitted the amount to Mary Malloy sufficiently to render himself liable to be sued by her as for a debt due to her by him, then Joseph Kelly’s summons could not be objected to.

In *Cababé on Attachment Law* (3rd ed., 1900), p. 13, it is said: “It seems, too, that the (attaching) order may be made against executors, if the testator was indebted to the debtor, but in this case the order ought to shew on its face that it is directed to them as executors, and does not profess to charge them personally,” citing *Mellish, L.J., in Stevens v. Phelps*, L.R. 10 Ch. 417, 423. In that case, of a creditor of the deceased, not a next of kin, the order for payment was not made although the money had been ordered when obtained and paid into court to be carried to a separate account in court under the creditor’s name. The statement that the attaching order should shew that it was made as against executors was, in that case of a creditor, little more than a dictum, and it may be questioned whether the same Judge would have held that the two executors of the testator could safely pay the creditor after the attaching order, and the case was in the Superior Court. The case was quoted in *Strong v. Culver*, 45 D.L.R. 542, where the Court of Appeal in Saskatchewan held that a distributive share could not be sued for or attached as a debt.

At pp. 166 and 167 of Mr. Cababé’s work, it is said: “If the debtor be dead, no charging order can be obtained against his executors, unless and until judgment has been obtained against



them as executors, and it is doubtful whether, under the existing procedure, this can be done at all." But that is dealing with the stronger case of a creditor and not a next of kin.

In *Wade on Attachment*, sec. 455, it is said: "In general, the personal representatives of a decedent are held not liable as garnishees, in respect to unpaid legacies or distributive shares in their hands, prior to an order of distribution if at all." And to the same effect in sec. 425.

The admission in the statement of facts that Mary Malloy was at the commencement of the action entitled to \$391.12 does not advance the appellant's position. She might be entitled to it and yet not entitled to sue for a debt; and, if she was entitled to sue, then it was James Kelly's debt and properly garnished by Joseph Kelly.

I may add that the case does not present itself as one for straining technicalities in favour of a secured mortgagee as against an unsecured creditor.

I would dismiss the appeal.

*Appeal allowed (MAGEE, J.A., dissenting).*

#### [APPELLATE DIVISION.]

ERSKINE-SMITH CO. v. BORDELEAU.

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*Contract—Promise to Pay Debt of Another—Guarantee—Statute of Frauds — Property-interest of Person Charged — Lien under Mechanics' Lien Act, R.S.O. 1927, ch. 173 — Agreement not to Register a Lien—Absence of Evidence of—Nudum Pactum—Effect of secs. 5, 8, 9 of Act.* March 18.

R. had a contract with the defendant, the owner of a building, to do some work thereon. The plaintiffs supplied R., on credit, with material for the work; and, alleging a promise by the defendant to pay for the material if R. did not, sued the defendant as upon a guarantee, R. having failed to pay:—

*Held*, that, there being nothing in the evidence to suggest that there was any bargain with the defendant that the plaintiffs would not register a mechanic's lien on the defendant's property, there was no consideration for the alleged promise of the defendant.

If there had been such a bargain, it would have been *nudum pactum* under the Mechanics' Lien Act, sec. 5, not being in writing.

The plaintiffs' lien was limited to the amount the defendant owed R. (secs. 8 and 9 of the Act), and there was no advantage to the defendant in preventing the plaintiffs from registering a lien as long as R. preserved his right to do so.

In order to bring a case within the authority of the "property cases," it is essential that there shall be some real advantage to the prom-

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isor, in connection with his property, to sustain a promise to pay the debt of another; and this advantage in the present case was absent, as the increase in value due to the work would accrue whether a lien was or was not registered.

Indirect advantage is not sufficient.

The action therefore failed by reason of the Statute of Frauds.

Review of the authorities.

AN appeal by the plaintiffs from the judgment of the First Division Court of the County of Carleton dismissing an action to recover \$140 on an alleged guarantee.

February 14 and 15. The appeal was heard by MULOCK, C.J. O., MAGEE, HODGINS, and FISHER, J.J.A.

*L. P. Sherwood*, for the appellants. The trial Judge erred in finding that the defendant was a guarantor within the Statute of Frauds. The statute does not apply when the guarantor is personally interested in the work done apart from the promise made. In any event there was consideration for the promise, in the express abandonment by the plaintiffs of their lien on the promises of the defendant. Reference to *Forth v. Stanton* (1669), 1 Wms. Saund. 220, note at p. 233; Annotation by J. D. Falconbridge in 55 D.L.R. 1; Halsbury's Laws of England, vol. 15, pp. 458 and 463; *Adams v. Craig* (1911), 24 O.L.R. 490; *Conrad v. Kaplan* (1914), 24 Man. R. 348; *Morin v. Hammond Lumber Co.*, [1923] S.C.R. 140, at p. 148; *Petrie v. Hunter* (1884), 10 A.R. 127. *Davys v. Buswell*, [1913] 2 K.B. 42, also referred to and distinguished.

*J. A. McEvoy*, K.C., for the defendant, respondent. The evidence does not shew that there was an agreement to pay by the defendant in return for the abandonment by the plaintiffs of their lien. The abandonment of the lien does not constitute consideration, because the plaintiffs had no claim on the property of the defendant. They had only a claim on certain moneys due to the contractor, and such an interest is not within the line of property cases referred to by counsel for the appellants. Even if there were consideration, it does not take it out of the statute because it was a guarantee and not a direct promise. Reference to De-Colyar's Law of Guarantees, 3rd ed., pp. 108-9, 130 *et seq.*; *Davys v. Buswell*, *supra*; *Mountstephen v. Lakeman* (1871), L.R. 7 Q.B. 196.

March 18. The judgment of the Court was read by HODGINS, J.A.:—Appeal by the plaintiffs from a judgment of Constantineau, County Court Judge, sitting in the First Division Court of the County of Carleton.

The action was brought by the plaintiffs, who supplied certain material to one Rioux, who had a contract with Bordeleau, the owner of the building, for the doing of certain work thereon. The plaintiffs allege that the defendant promised to pay for the material supplied to Rioux if Rioux did not pay for it.

The very concise argument of Mr. Sherwood was directed to bringing this case within what are known as the property cases in respect of a guarantee for the debt of another, which are explained in the notes to *Forth v. Stanton*, 1 Wms. Saund. 220, 233, thus:—

“The question whether any particular case comes within this clause of the statute (sec. 4) or not, depends not on the consideration for the promise, but on the effect of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.”

I think the plaintiffs must fail upon a ground not raised on the argument as well as on the general law applicable to cases of this kind. I have read the evidence in the case carefully, and the strongest evidence adduced on behalf of the plaintiffs is found in these words:—

“Q. Did you have any similar conversation with Mr. Bordeleau? A. I had at different times. I have been up to Mr. Bordeleau’s shop and place of business in connection with the work, and at the time I mentioned to him about the way the work was going on, and I certainly wasn’t satisfied with this man Rioux, and I was feeling uneasy, and I wanted assurance for the pay, to be in a position to put a lien on it, I said, if I don’t get the assurance of Mr. Bordeleau.

“Q. What did Mr. Bordeleau say on this other occasion. A. He said the same thing, not to be uneasy at all about it, that if Rioux didn’t pay me, he would pay me.”

It will be observed that there is nothing in the above evidence, and there certainly is nothing in the rest of the testimony, to suggest that there was any bargain with the defendant that the plaintiffs would not put on a lien. If they had expressly agreed to this, it would be *nudum pactum* under the Mechanics’ Lien Act, R.S.O. 1927, ch. 173, sec. 5. Under that section no promise or agreement, unless it be an express agreement in writing, is effective in law to bar a contractor or sub-contractor from registering a lien. Therefore, if the evidence can by any possibility be stretched as far as I have suggested, it can form no consideration for the promise of the defendant.

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That the defendant had an interest that the work of the plaintiffs and of Rioux should go on is of course obvious. But his property could only be made liable if Rioux failed to pay the plaintiffs, and then only to the extent to which the defendant failed to pay Rioux. In other words, the plaintiffs' lien was limited to the amount the owner owed the contractor (secs. 8 and 9). It is manifest that there was no advantage to the defendant in preventing the plaintiffs from filing a lien as long as Rioux preserved his right to do so; and it is essential in the property cases that there shall be some real advantage to the promisor in connection with his property to sustain the promise to pay the debt of another. This advantage in the present case is absent, as the increase in value due to the work would accrue whether a lien was or was not registered.

The words of the late Chancellor in *Young v. Milne* (1910), 20 O.L.R. 366, are instructive:—

“When the plaintiff, in consideration of the promise to pay, has relinquished an execution under which some advantage or security exists or is likely to be realised, and when the effect of relinquishment is that such interest or advantage accrues to the defendant who has made the promise, then no writing is required, for the transaction is substantially one for the purchase of the execution. But, if the promise is given in consideration of a promise of forbearance for a time, and the execution is, as here, withdrawn, yet, as no direct benefit therefrom has arisen to or was contemplated by the promisor, it is simply a promise to pay the debt of another, which is valid enough as far as the consideration is concerned, but is not enforceable because not put into writing.”

Cases such as *Fitzgerald v. Dressler* (1859), 7 C.B.N.S. 374, *Davys v. Buswell*, [1913] 2 K.B. 47, and *Adams v. Craig*, 24 O.L.R. 490, shew that indirect advantage is not sufficient. In an American case of *Ames v. Foster* (1871), 106 Mass. 400, this is very well put in these words (pp. 402, 403):—

“It is no sufficient ground to prevent the operation of the statute of frauds, that the plaintiff has relinquished an advantage, or given up a lien, in consequence of the defendant's promise, if that advantage has not also directly enured to the benefit of the defendant, so as in effect to make it a purchase by the defendant of the plaintiff. The cases in which it has been held otherwise are those where the plaintiff, in consideration of the promise, has relinquished some lien, benefit or advantage for securing or recovering his debt, and where by means of such relinquishment the



same interest or advantage has enured to the benefit of the defendant. In such cases, although the result is that the payment of the debt of the third person is effected, it is so incidentally and indirectly, and the substance of the contract is the purchase, by the defendant of the plaintiff, of the lien, right or benefit in question.

"It is equally true that it is no sufficient ground for taking the case out of the statute, that the defendant has received some benefit from the consideration of his promise. If this were so, then every promise to guarantee the debt of another, made upon a pecuniary consideration paid by the promisee to the promisor, would be taken out of the statute. In all cases, the question is, whether the promise is in substance a promise to pay the debt of another, or whether it is a promise by the promisor to pay his own debt, the extent of which is measured by the amount due by another."

In the *Davys* case, [1913] 2 K.B. at pp. 55 and 56, Vaughan Williams, L.J., expresses much the same idea in speaking of a debenture-holder who guaranteed payment of goods sold to the company which issued the debenture:—

"In the present case the fact is that the plaintiff who gave this guarantee was in such a position, as the holder of a debenture of the company in respect of which he gave it, that it was clearly to his interest that the business of the company should continue to be carried on, and that goods should continue to be delivered to the company, so that, if and when he interposed to realise his security by the appointment of a receiver, there might be more which the receiver might take possession of for his benefit. He did not, however, give the guarantee in performance of an obligation under any antecedent contract, or of any obligation or liability under which he lay, independently of the particular promise which constituted the guarantee. His motive—I deliberately use the word 'motive,' and not 'object'—in giving the guarantee was that he thought that it would be for his advantage that the business of the company should continue to be carried on. I do not think that, in any sense in which the word 'interest' has been used in any of the prior cases on the subject, the plaintiff here had any such interest as would make it true to say that he gave the guarantee by reason of any liability or obligation which existed independently of the guarantee, or that he was contracting for the protection of any right."

In *Couturier v. Hastie* (1852), 8 Ex. 40, by way of contrast, the question was whether the defendants were responsible, by

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 1929. not in writing to pay the debt. The Court held that a higher re-  
 ERSKINE- ward was paid to such an agent for his increased responsibility,  
 SMITH CO. and that, while it might terminate in a liability to pay the debt  
 v. of another, that was not the immediate object for which the  
 BORDELEAU. promise was given, and the defendant was liable.  
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*Appeal dismissed.*

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[ROSE, J.]

March 20.

McSTRAVICK V. CITY OF OTTAWA.

*Municipal Corporations—"Supervised Playgrounds"—Injury to Child  
 —Invitation—Representation—Negligence of Supervisor—Liability  
 of Corporation—Duty to Protect Children from Known Danger—  
 Damages.*

The defendant city corporation established and conducted "Supervised Playgrounds" throughout the city and employed supervisors to take charge of them:—

*Held*, that the corporation assumed, or held itself out as having assumed, the obligation of taking reasonable care of such children as should resort to the playgrounds, and was bound to make some reasonable effort to protect them from dangers known or reasonably to be apprehended.

There was more than an invitation—there was a representation that there would be such supervision of the activities of all the children as would ensure the reasonable safety of each.

And *held*, in the case of a boy who was injured in a civic playground by a stone thrown by another boy, that his injuries resulted from a failure by the defendants to use reasonable care, their supervisor having failed to provide any protection against a certain known danger, in fact created by the supervisor himself — it not being shewn that there was any necessity of creating the danger—and the corporation was liable in damages for the boy's injury and consequent loss and expense.

IN this action, Harold McStravick, an infant, sued by his mother as his next friend for damages for personal injuries sustained by him by reason, as he alleged, of the negligence of the supervisor of a playground owned and maintained by the defendants, the Corporation of the City of Ottawa; and Mrs. McStravick, the boy's mother, on her own behalf sought compensation for expense incurred by reason of Harold's injuries and for the loss of the benefit of his future services.

The action was tried before ROSE, J., without a jury, at Ottawa.  
*A. G. McHugh*, for the plaintiffs.  
*F. B. Proctor*, K.C., for the defendants.

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March 20. ROSE, J.:—The infant plaintiff is now 14 years of age. On the 20th June, 1927, he went to one of the city's "supervised playgrounds" to play, as he was in the habit of doing, or to watch a game which was being played. He was standing beside the supervisor when a boy named Vézina was seen to be doing something prohibited by the regulations. The supervisor went to Vézina, took him by the arm, and, it is said, kicked him, but did not eject him from the playground. Then, when the supervisor had returned to the place where McStravick was, Vézina threw a stone at the supervisor, striking him on the hand and injuring one of his fingers. The supervisor again went to and punished Vézina, and again returned to his former place. Vézina threw another stone, this time missing the supervisor but striking McStravick in one of his eyes, which was so injured that its removal became necessary. McStravick was in hospital for some 15 days, he was unable to take his school examinations, the present usefulness of his remaining eye is said to be impaired—he speaks of a blurring of vision which has interrupted his studies—and, no doubt, his prospects in life are less favourable than they would have been if he had not been injured.

The defendant corporation denies all liability.

In the statement of defence it is admitted that the corporation has established and conducts civic playgrounds throughout the city of Ottawa and employs supervisors to take charge of them; and, while no evidence was given as to what invitation was issued in reference to the particular playground in which the infant plaintiff was injured, every one knows that the object of municipal authorities in setting aside such grounds is to provide places, safer than the streets, in which children may play; and that in the very description of the places as "supervised" playgrounds there is a representation to parents that some care will be taken of such children as are sent there to play. That being so, it seems to me that when a municipality's invitation is accepted, and children are sent to such a playground or go there of their own volition, the municipality comes under an obligation to make some reasonable effort to protect them from dangers that are known or reasonably are to be apprehended. There is something different from a mere invitation to the children to use the playground as they find it—there is a representation that there will be such



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supervision of the activities of all the children as will ensure the reasonable safety of each child.

If some representation or promise such as I have suggested is made by saying that a playground is supervised, cases like *Harris v. Guigue* (1923), 53 O.L.R. 363, in which an obligation to protect from assaults was held not to arise out of the relationship, for example, of master and servant, have no application, and such cases as *Canadian Pacific Railway Co. v. Blain* (1903), 34 Can. S.C.R. 74, in which a carrier was held to be under obligation to a passenger to take precautions to protect him from an assault known to the carrier to have been threatened, are more nearly in point.

Mr. McHugh cites *Jackson v. London County Council and Chappell* (1912), 28 Times L.R. 359, 76 J.P. 37 and 217, 10 L.G.R. 75 and 348 (the reports in J.P. and L.G.R. being fuller than that in Times L.R.), a decision of the Court of Appeal. In that case a contractor had left sand and gravel in a truck in a corner of the playground of an elementary school. The headmaster had seen the truck with its contents, and, thinking it a source of danger, had ordered its removal, but his orders had not been carried out. At the close of the afternoon school some of the boys tipped up the truck and pelted one another with some of the contents, and one of the boys, the plaintiff Jackson, was struck in the eye and injured. The jury having found that the school authorities were guilty of negligence causing the injury, the Court upheld a judgment entered in favour of the plaintiff, upon the footing that the finding must mean that the truck was a dangerous thing to leave where it was. This perhaps is helpful, but there are obvious distinctions between it and the present case and it is by no means conclusive.

However I do not think that much is to be gained by the citation of authorities; I think the questions in this case are two questions of fact, the first whether the defendants assumed, or, what is the same thing, whether they held themselves out as having assumed, the obligation of taking reasonable care of such children as should resort to the playground, and the second, whether, granted the existence of the obligation, Harold McStravick's injuries resulted from a failure by the defendants to use the reasonable care mentioned.

In my opinion each of the questions just stated ought to be answered in the affirmative. As to the first, something has been said, and it suffices to add that supervision, whether it be called supervision of the children or of their games or of the playground,



involves at least some keeping of order, some stopping of fights, some general protection of the children against dangers that are known or that are to be apprehended. And as to the second question, the case appears to me to be this: The supervisor, having observed Vézina's reaction to the first infliction of punishment, was warned that a repetition of the punishment might be followed by a repetition of the stone-throwing. Obviously, stones thrown by an angry boy, even if they are aimed at the supervisor, are a source of danger to the other children in the vicinity; and so if the supervisor felt bound to repeat the punishment his duty to the children other than Vézina was to take some care either to prevent Vézina from throwing stones or to protect those other children from such stones as might be thrown; and failure to perform that duty was negligence; and if there were no available means of checking Vézina's propensity to throw stones when punished in the manner first adopted, or of protecting the other children from such stones as might be thrown, then the second administration of punishment was, towards the other children, an act of negligence. The plaintiffs' case does not rest, as counsel for the defendants suggested it does, upon an allegation of a wrong done to Vézina, followed by a tortious act of Vézina which caused injury to Harold McStravick. It is immaterial whether, as against Vézina, the supervisor was or was not a wrongdoer. The plaintiffs' cause of action is that the supervisor was under an obligation to them to take some care for the safety of Harold McStravick and that he failed to provide any protection against a certain known danger; and they shew, not only that the danger was or ought to have been known, but also that the supervisor himself created it. And the defendants, who adduced no evidence, have not attempted to shew that there was any necessity of creating the danger.

It is not easy to assess the infant plaintiff's damages. The loss of some school-time, with the resultant missing of an examination, is perhaps not a very grave matter at his age; and the suffering was not of long duration. But there will be disfigurement, inconvenience, expense, probably a lessened earning power, perhaps some impairment of the vision of the remaining eye. The disfigurement, according to the only expert called (who gave his evidence with admirable fairness), is not only in the loss of the eye but also in the fact that the removal of an eye before the skull has attained its full growth causes a certain visible deformation. There will be expense in the repeated purchase of glass-eyes. These become roughened in use, and when they are rough

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they cause irritation. Their life is said to be about 9 months. Those that Harold McStravick has had have cost \$8 each. He has not been able to wear them in the cold weather. The diminution of earning power, on the assumption that the boy's employment would have been in industry, lies in the fact that the field of vision is lessened by some 50 degrees and that the ability to estimate distances is impaired. In some jurisdictions he would be refused a licence to drive a public conveyance; in most factories there is a disinclination to employ a one-eyed man. The witness had not recently made an examination of the remaining eye. When last he examined it, it appeared to be normal. He can speak only of the possibility, not of the probability, of the impairment of its usefulness. On the whole of the evidence I think that \$5,000 (which is the sum claimed on behalf of the boy) is a reasonable, and certainly not an excessive, estimate of his damages.

The expenses to which Mrs. McStravick has been put amount to \$238, and she will have judgment for that sum. She claims also for loss of Harold's services and for a prospective future loss; but she does not shew that the boy was earning any money; and there is no basis for a finding that, but for the injury, earnings of his to which she would have been entitled would have been greater than they will be; therefore I think that she cannot have anything other than her out-of-pocket expenses.

There will be judgment accordingly, with costs.

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[IN CHAMBERS.]

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 March 20.

RE WINDSOR TERMINAL WAREHOUSE AND TRANSPORT CO. LTD.  
 ESSEX AND LAMBTON CASES.

*Intoxicating Liquors — Seizure by Liquor Inspectors — Magistrates' Orders for Confiscation—Motions to Quash—Judicature Act, R.S.O. 1927, ch. 88, secs. 64, 65—Jurisdiction of Court—Inquiry whether there was any Evidence to Support Orders—Liquor in Course of Transportation through Ontario for Export—"Common Carrier"—Liquor Control Act, R.S.O. 1927, ch. 257, secs. 90, 113.*

Two orders were made by police magistrates directing confiscation of certain parcels of intoxicating liquor which had been seized by liquor inspectors for alleged contravention of the Liquor Control Act. Upon motions to a Judge of the High Court Division sitting in Chambers, under sec. 64 of the Judicature Act, to quash the orders, it was *held*, that the Judge had no jurisdiction to inquire whether there was evidence to support the orders or whether the

magistrates had misdirected themselves in considering the evidence. *Rex v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128, followed.

Section 65 of the Judicature Act, which was passed to avoid the effect of that decision, does not apply to orders but only to convictions. Even if sec. 65 was applicable, there was in both cases some evidence justifying the orders; and the motions could not succeed.

In both cases the liquor was seized when in the possession of a trucking company, claiming to be a common carrier; and that company applied to the magistrates, under sec. 113 of the Liquor Control Act, for redelivery of the liquor to it. The applications were refused:—

*Semble*, if it clearly appeared on these applications that the goods were, when seized, in course of transport through Ontario for export and were in the custody of a common carrier for that purpose, the magistrates should have directed redelivery, notwithstanding that the goods were not accompanied by the customs form B.13; but, even though the goods were adequately covered by form B.13, they were not immune from seizure if it appeared that this was a mere cover, and that the liquor was really being "short circuited" into Ontario.

*Semble*, also, that it could not be said upon the evidence that one of the police magistrates was wrong in his conclusion that the company was not a common carrier.

If, while in course of transportation through Ontario, the liquor gets out of the custody of a common carrier, whether in a warehouse or elsewhere in the possession of one who is not a common carrier, it is in an illegal place within the meaning of sec. 90 of the Liquor Control Act.

*Rex v. O'Keefe's Beverages Ltd.*, *Rex v. Robinson* (1926), 31 O.W.N. 124, 46 Can. Crim. Cas. 396, referred to.

And the liquor inspectors acted warrantably in making the seizures, there being nothing to indicate a *prima facie* case of export.

APPLICATIONS by the above-named company, under the provisions of sec. 64 of the Judicature Act, for orders of this Court quashing two orders made by Police Magistrates directing confiscation of certain parcels of intoxicating liquor which had been seized by liquor inspectors for alleged contravention of the Liquor Control Act\* (Ontario) and directing redelivery to the applicant-company.

March 12. The applications were heard by MASTEN, J.A., in Chambers.

J. H. Rodd, K.C., for the applicant-company.

W. B. Common, for the Attorney-General for Ontario.

March 20. MASTEN, J.A.:—In the first matter the application relates to an order of D. M. Brodie, Esquire, Police Magistrate, dated the 19th day of January, 1929, and in the second matter it relates to an order of Charles Woodrow, Esquire, Police Magistrate, dated the 11th February, 1929. In each case certain parcels of liquor had been seized by the Government liquor inspectors

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Masten, for alleged contravention of the Liquor Control Act. Thereupon  
J.A. the Windsor Terminal Warehouse and Transport Company  
1929. Limited, claiming to be a common carrier in possession of the  
 RE property at the time of its seizure, applied, pursuant to sec. 113\*  
 WINDSOR of the Liquor Control Act, R.S.O. 1927, ch. 257, to have the liquor  
 TERMINAL so seized redelivered to it. The application was refused in each  
 WAREHOUSE case. The orders pronounced by the magistrates directed the con-  
 AND fiscation of the liquor seized.  
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Thereupon the present applications were made, under the provisions of sec. 64 of the Judicature Act, R.S.O. 1927, ch. 88, to quash the orders of the magistrates confiscating the liquor in question, and for an order directing its redelivery to the applicant-company.

The ground urged in support of the applications is that the liquor in question was, at the time of seizure, in course of transportation through Ontario for the purpose of export to the United States; and, that being so, it is contended that the goods seized were not subject to the provisions of the Liquor Control Act, which Act does not and could not constitutionally interfere with their export, which is a branch of trade and commerce. It is contended, further, that, as the only evidence in the Essex case is that the liquor in question was about to be placed in boats for

\* 113.—(1) Where liquor is found by any provincial police inspector, constable or other officer on any premises or in any place under such circumstances and in such quantities as to satisfy the inspector, constable, or officer, that such liquor is being had or kept contrary to any of the provisions of this Act, it shall be lawful for the inspector, constable, or officer to forthwith seize and remove by force, if necessary, any liquor so found, and the packages in which the liquor was had or kept.

(2) Where liquor has been seized by an inspector, constable or officer under any of the provisions of this Act, under such circumstances that the inspector or constable is satisfied that such liquor was had or kept contrary to any of the provisions of this Act, he shall, under the provisions of this section, retain the same and the packages in which the same was had or kept.

(3) If within thirty days from the date of its seizure no person, by notice in writing filed with the Board, claims to be the owner of the liquor, the liquor and all packages containing the same shall *ipso facto* be forfeited to His Majesty in the right of the Province, and shall forthwith be delivered to the Board.

(4) If within the said time any claimant appears, it shall be incumbent upon him within that time, and after three days' notice in writing filed with the Board stating the time and place fixed for the hearing, to prove his claim and his right under the provisions of this Act to the possession of such liquor and packages to the satisfaction of any justice, and on failure within that time to prove and establish his claim and right the liquor and packages shall *ipso facto* be forfeited to His Majesty, in the right of the Province.



shipment to the United States, the magistrate ought to have vacated the seizure and directed that the liquor be delivered back to the applicants.

Mr. Rodd further contended that at the time of seizure the liquor was in the custody of the applicant-company; that it is a common carrier; and that it was, as such, at the time of seizure, transporting the liquor in question from a Canadian Pacific freight-car to the boat or ship by which it was to be carried to Detroit.

In answer, Mr. Common urges, in support of the magistrate's orders, the provisions of sec. 90 of the Liquor Control Act, which declares:—

“Except as authorised by this Act, no person not holding a permit under this Act entitling him so to do, shall have any liquor in his possession within the Province.”

He contends that the burden of proving the right to have in its possession the liquor in question was on the applicant-company, as being the person accused of improperly having such liquor. See sec. 132 of the Liquor Control Act.

In other words, the onus was on the applicant-company to establish to the satisfaction of the magistrate that the liquor in question was *bonâ fide* in transit through Ontario in process of export to Detroit.

Mr. Common supplements this point by urging that the packages seized were not even accompanied by the Customs form known as B.13, but were in fact just so many unidentified cases of liquor illegally in possession of a person who was not, as he contends, a common carrier.

After perusal of the evidence and a consideration of all the circumstances, I am clearly of opinion that the liquor inspectors acted warrantably in seizing the liquors in question, there being nothing to indicate a *prima facie* case of export.

But, when the applications came before the police magistrates, the real question fell to be determined, namely, was the liquor in question in course of transportation through Ontario to Tom Sweet, Detroit, by way of export to him, and was it, for that purpose, at the moment of seizure, in the possession of a common carrier?

No controversy arises or could arise in regard to the fundamental claim of the applicant-company that liquor which forms the subject-matter of a *bonâ fide* export transaction, and which is being transported through Ontario, is not subject to seizure under the Ontario Liquor Control Act, while in the possession of a common carrier for purposes of such transportation.

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The real difficulty arises in applying this undoubted principle to the facts and circumstances of the particular case.

In the Essex case the Police Magistrate appears to hold that the applicant, the Windsor Terminal Warehouse and Transport Company Limited, is not a common carrier, and in both cases the evidence fails to satisfy the presiding magistrate that the applicant-company has met the onus cast upon it by sec. 132\* of the Liquor Control Act.

Thereupon, the first question that arises on the present application is: What jurisdiction have I, in *certiorari* proceedings under sec. 64, to inquire into or consider the evidence?

Section 65 of the Ontario Judicature Act, the section which was passed to avoid the effect of the decision in *Rex v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128, has, in my opinion, no application to this case. By its language that section is directed to a motion to quash a "conviction" "for an offence known to the law."†

The orders in question are not in any sense convictions for offences, and consequently my jurisdiction on this application is to be exercised in accordance with the limitations prescribed by the rules laid down by the Privy Council in *Rex v. Nat Bell Liquors Ltd.* (*supra*), that is to say, the orders cannot be quashed on *certiorari* on the ground that the depositions shew that there was no evidence to support the orders or that the magistrates had misdirected themselves in considering the evidence.

In the present applications no question is raised and none, so far as I can see, could be raised, regarding the jurisdiction of the magistrates over the applications which came before them, and the

\* 132.—(1) The burden of proving the right to have or keep or sell or give or purchase or consume liquor shall be on the person accused of improperly or unlawfully having or keeping or selling or giving or purchasing or consuming such liquor.

† Sections 64 and 65 of the Judicature Act, R.S.O. 1927, ch. 88, are, so far as material, as follows:—

64.—(1) Where it is desired to move to quash a conviction, order, warrant or inquisition, the proceeding shall be by motion in the first instance instead of by *certiorari*, rule or order *nisi*. . . .

(6) The notice shall be returnable before a Judge of the High Court Division sitting in Chambers. . . .

65. Upon a motion to quash a conviction it shall be the duty of the judge to examine and consider the proceedings returned to the court and if such proceedings shew that the person accused has been convicted of any offence known to the law, and that there is any evidence to sustain the conviction, such conviction shall be affirmed, but otherwise such conviction shall be quashed; provided, however, that if the evidence returned shews that the accused is guilty of an offence against the law, or that the conviction, though irregular, ought to be amended or drawn so as to duly describe such offence, the conviction shall be affirmed or amended as justice may require.

orders pronounced are on their face regular and in accordance with the law. That being so, I have no jurisdiction to interfere.

But, if I am wrong in the view that sec. 65 of the Ontario Judicature Act does not apply to this case, I must still arrive at the same conclusion, for I am of opinion that there was some evidence in each case justifying the order that was made. That being so, I am bound, under sec. 65, to maintain the orders.

For this reason and on this ground both applications must be refused; but, as several other questions said to be of importance in the operation of the Act in question were argued before me, it may perhaps be desirable that some reference should be made to them.

I agree with Mr. Rodd's argument that if, on the motion to restore the liquor seized, it clearly appears that the goods were, when seized, in course of transport through Ontario for export, and were in the custody of a common carrier for that purpose, the magistrate ought to direct that the applicant-company be repossessed of the goods, notwithstanding the fact that they are not accompanied by the Customs form known as B.13. On the other hand, even though the parcels of liquor are adequately covered by the Customs form known as B.13, yet they are not immune from seizure if it appears that this is a mere cover, and that the liquor is really being "short circuited" into Ontario. An excellent illustration of what I mean is afforded by the Lambton case now under consideration. In that case the magistrate finds:—

"The forms B.13, which were submitted as a protection, set out that certain goods were consigned by various consignors by railway to Windsor, thence by the Windsor Terminal Warehouse and Transport Company to destination, the destination in each case being the United States of America, and the consignee being given as 'Tom Sweet, Detroit, Michigan.' The liquor that the truck-driver started with from Windsor did not proceed to its destination, the United States of America, to be delivered to the consignee, Tom Sweet; but, according to the driver's evidence went first east as far as Chatham, then from Chatham to Wallaceburg, and from Wallaceburg to Port Lambton. At Port Lambton 3 cases were delivered to a man named Laporte; at Sombra 10 cases were delivered to a man named Dupuis; 43 cases were delivered to a man named Neville; and the balance of 25 cases were going to be delivered in Courtright to a man named Johnston. In no case was any portion of the liquor being delivered to its destination, 'Tom Sweet, of the city of Detroit, in the State of Michigan.' "

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Under such circumstances the *prima facie* evidence of export which might perhaps be afforded by a B. 13 form, if properly made out, is rebutted by the actual facts.

Some discussion also took place before me as to whether or not the Windsor Terminal Warehouse and Transport Company Limited is a common carrier. As I understand the law to have been determined in the cases of *Rex v. O'Keefe's Beverages Ltd.*, *Rex v. Robinson* (1926), 31 O.W.N. 124, 46 Can. Crim. Cas. 396, the liquor in course of transportation through Ontario must be continuously in the possession of a common carrier, and if, while in Ontario, it gets out of the custody of a common carrier, whether in a warehouse or elsewhere in the possession of some one who is not a common carrier, it is in an illegal place within the meaning of sec. 90 of the Liquor Control Act, even though it is at the time actually in course of transportation with the *bonâ fide* intention of exporting it. Hence it arises that the question whether the Windsor Terminal Warehouse and Transport Company Limited is or is not a common carrier may be of importance, as also is the question whether the boats to which the liquor here in question was about to be transferred were common carriers.

In the Essex case the magistrate has found against the applicant-company's contention that the trucking company was a common carrier; and, so far as I can find, no evidence whatever was given regarding the boats to which it was proposed to transfer the liquor.

I find myself entirely unable, on the evidence now before me, to say that the Police Magistrate was wrong in his conclusion.

It may be that in another proceeding the applicant, the trucking company, may be able to prove that it is a common carrier of liquor, that is, that, while it confines its trucking operations to one class of goods, it is a public carrier bound to carry liquor for any person desirous of employing it. All I say is that, on the evidence adduced in these cases, I am unable to say that the magistrate was in error in holding that it was not a common carrier.

On the ground which I have first stated, the applications are refused with costs.

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[ROSE, J.]

SCOTTISH WIDOWS' FUND AND LIFE ASSURANCE SOCIETY V.  
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1929.

March 20.

*Company*—*Loan Companies Act, R.S.C. 1927, ch. 28, secs. 65, 66, 67*—*"Debenture Stock"*—*Whether Redeemable at Option of Holder.*

Debenture stock issued by a loan company proceeding under sec. 65 of the Loan Companies Act of 1914, 4 & 5 Geo. V. ch. 40 (Dom.), as amended by 12 & 13 Geo. V. ch. 31, sec. 4, is not redeemable at the option of the holder.

Sections 65, 66, and 67 of the present Act, R.S.C. 1927, ch. 23, considered.

"Debenture stock" is a term of loose meaning.

*Attree v. Hawe* (1878), 9 Ch. D. 337, applied.

MOTION by the plaintiffs, holders of certain debenture stock of the defendants, for judgment upon the pleadings in an action for redemption of the stock under the provisions of the Dominion Loan Companies Act, R.S.C. 1927, ch. 28, secs. 65 *et seq.*

March 20. The motion was heard by ROSE, J., in the Weekly Court, Toronto.

*D. W. Saunders*, K.C., for the plaintiffs.

*T. D'Arcy Leonard*, for the defendants.

ROSE, J. (at the conclusion of the argument):—This question is by no means free from difficulty, but I think that it is better that I should state now what seems to me to be the correct conclusion rather than that I should reserve judgment, which, if I reserved it, would perhaps not be given for a very considerable time.

The law has been very explicit, since a time considerably earlier than any of the debenture stock under consideration in this action was created, that the directors of a loan company may with the consent of the shareholders create and issue debenture stock on such terms and bearing such rate of interest as the directors from time to time think proper; that debenture stock so issued shall be treated and considered as part of the ordinary debenture debt of the company and shall rank equally with the ordinary debenture and deposit debt of the company; and that holders of debenture stock shall not have conferred upon them greater rights than are held or enjoyed by depositors or holders of ordinary debentures.

The present law is in sec. 67 of the Loan Companies Act, R.S.C. 1927, ch. 28. The earlier sections, I am informed by counsel, were, if not identical, at least to the same effect.

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This company, having issued debenture stock such as is mentioned in the section, issued debenture stock certificates, samples of which are given in paras. 12 and 14 of the statement of claim. By the certificates it was witnessed that the holders were the registered proprietors of the  $4\frac{1}{2}$  or 4 per cent. debenture stock, as the case might be, of the corporation, redeemable at par in the one case in the option of the corporation, and in the other case redeemable in the option of the corporation. Beyond that statement, that the holder of the certificate was the registered proprietor of the  $4\frac{1}{2}$  or the 4 per cent. debenture stock, there was no direct promise that he would be paid his interest, and there was no promise anywhere that he would be repaid his principal.

The company desired to avail itself of the provisions made in the statute for increasing the amount of money that it might receive upon deposit. The statute under which it proceeded was sec. 65 of the Loan Companies Act of 1914, 4 & 5 Geo. V. ch. 40, as amended in 1922 by 12 & 13 Geo. V. ch. 31, sec. 4. The procedure laid down by the statute was the passing of a by-law by the directors, approved by at least three-quarters of the shareholders present or represented at the meeting, to increase the amount that might be received on deposit; and the conditions were—or the conditions that are important here were—that a copy of the by-law and of the notice of meeting should be sent to every registered debenture-holder resident out of Canada, and that the by-law should provide that any debenture-holder could, within 60 days after the approval of the by-law by the shareholders, notify the company that he objected to the by-law and made application for the redemption of any debenture held by him, and that thereupon he should be entitled to have the debenture redeemed according to its terms on the first interest-day following the receipt by the company of the notice, and that the company should on the said interest-day redeem the said debenture.

The present plaintiffs were holders of debentures commonly so-called, as well as of this debenture stock, and they received notice of the holding of the meeting; and they served the notice provided for in the statute, making application for the redemption of the debenture stock held by them. The company has redeemed the ordinary debentures held by the plaintiffs, but denies liability to redeem the debenture stock.

The plaintiffs' case depends upon making the words in sec. 65 of the Loan Companies Act of 1914, and the words of the by-law passed pursuant to that section, confer upon the holders of debenture stock the power which expressly is conferred only upon

the debenture-holders, and the argument—stating it very shortly —s that sec. 66 of the Loan Companies Act, as it stands at present, and sec. 67, which is the section to which I have referred, concerning the right to create the debenture stock, have enacted for all purposes, or at any rate for the purpose of the application of sec. 67(2), that debenture stock is to be treated as and included in the expression “debentures.” Now what sec. 66 does is to enact that all money of which the payment of interest is guaranteed by the company shall be deemed to be money borrowed by the company. That enactment stands by itself and is perfectly general, and I take it that the result of it is that, the company having, impliedly at least, guaranteed the payment of interest on the money invested in debenture stock, the money so invested is to be treated as money borrowed by the company—the holders of debenture stock having at some time and in some circumstances the right of repayment of their capital, although, as I have mentioned, there is not in the debenture stock certificate any provision for repayment. What sec. 67 does, in subsecs. 2 and 3, is to declare that debenture stock shall be treated and considered as part of the ordinary debenture-debt of the company, and, as I have said, that the holders of debenture stock shall not be given greater privileges than are enjoyed by holders of ordinary debentures. The words in subsec. 2 of sec. 67, “debenture stock shall be treated and considered as part of the ordinary debenture debt of the company,” were not fortunate words if what Parliament had in mind was to declare that certificates of the holding of debenture stock should be equivalent to and entitled to the same treatment as debentures; and, while there is a good deal to be said for the justice of any claim by the holders of debenture stock certificates to be treated in the same way as the holders of debentures in the particulars that are in question in this action, I find a great difficulty in reading the words in the way in which Mr. Saunders contends; and I find that difficulty notwithstanding the fact that sec. 66 does declare (as I read it) that the money invested in debenture stock is money borrowed by the company.

The term “debenture stock” is a term of loose meaning, but, without referring at length to the cases in which it has been discussed, I may refer to what was said by Lord Justice James in delivering the judgment of the Court in *Attree v. Howe* (1878), 9 Ch.D. 337, at p. 349. Speaking of the document that was before the Court in that case, the learned Lord Justice said that it seemed to be called “debenture stock” because it was anything but a debenture; that there was no debt except as to the annual

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interest; that the capital could not be called in and could not be paid off. (Pausing, I observe that the document differed somewhat from the debenture stock certificates issued in the present case, because those certificates are redeemable at the option of the loan company). And the Lord Justice went on to say that the debenture stock with which the Court had to deal was a right to a perpetual annuity payable out of the concern; that there was no conveyance or assignment of anything to the stockholder or to any trustee for him. And he went on to speak further of the character of the instrument. What I have said as having been said by him all applies, with the exception that has been noted, to the debenture stock with which I have to deal. There is here no conveyance or assignment of anything to the shareholder or to a trustee for him; and I gather that the investment was really the kind of investment referred to in *Attree v. Howe*—an investment creating a right to a perpetual annuity payable out of the concern.

Now that, I suppose, is the reason why the term “debenture stock” is used. The argument that has been addressed to me upon behalf of the plaintiffs seems to me to lay too much stress on the word “debenture” and to ignore to some extent the description of the certificate as a *stock* certificate—a stock certificate of a particular kind, it is true, a debenture stock certificate, but still a stock certificate. And so, coming back to sec. 67 of the Loan Companies Act, and asking whether the words there found are sufficient to justify me in reading sec. 65 of the Act as calling for notice to and as conferring rights upon the holders of debenture stock, I observe again that sec. 67 does not say that debenture stock shall be treated as debentures or that the holders of certificates of debenture stock shall be treated and considered as holders of part of the debenture debt. I find it impossible to give sec. 65 the reading contended for.

Section 67, I think, means, among other things, probably, that when you come to ascertain—for whatever purposes you have to ascertain—what the debenture debt of the company is, you take into account the amount invested in debenture stock, and that when you are winding up a company which has issued debentures and debenture stock you give equal rights to the holders of the debenture stock and to the holders of the debentures. The section may mean something additional to that, but I do not think it is at all equivalent to the interpretation clause found in the Companies Act, R.S.C. 1927, ch. 27, sec. 3(c). In that interpretation clause of the Companies Act the word “debenture” is made to include bonds and debenture stock. Parliament did not



in sec. 67 of the Loan Companies Act use language at all similar to that of the interpretation clause in the Companies Act, and I think I should be stretching sec. 67 altogether too far if I read it as an interpretation clause for sec. 65, which made sec. 65 into an enactment that a copy of the by-law and of the notice of meeting should be sent by registered mail to every registered debenture-holder and to every registered holder of a certificate for debenture stock; and that not only every debenture-holder but also every holder of a certificate for debenture stock should have the right to demand his money.

There are several reasons, apart from the mere difficulty in that construction of the language, that seem to arise when one tries to apply sec. 65, so interpreted, to the present case. I have mentioned only one: that is that sec. 65(2)(c) gives the right to the debenture-holder to demand redemption of his debenture according to its terms. Now in the case of the debenture stock certificates issued by this company there is no term for redemption except for redemption at the option of the company, and I do not know how the holder of the debenture stock certificate would be benefited by a declaration that he is entitled to have his debenture stock redeemed if and when the company desires to redeem it. However, that consideration may not be as important, in fact I am quite sure it is not as important, as the difficulty in reading the words of sec. 67(2) and (3) as furnishing an interpretation of the meaning of the expression "debenture-holder" as used in sec. 65, and I think that the holding must be that the plaintiffs have not the rights which they are asserting.

The motion being for judgment, the action is dismissed. I suppose the costs must follow the event.

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[SUPREME COURT OF CANADA.]

REX v. BAKER.

1929.

March 20.

*Criminal Law—Negligent Breach of Duty Causing Grievous Bodily Injury—Workman in Mine—Momentary Forgetfulness—Criminal Code, secs. 247, 284—Criminal Responsibility.*

The judgment of the Appellate Division of the Supreme Court of Ontario, 63 O.L.R. 275, was affirmed.

*Held*, that the almost involuntary act of the accused, the man in charge of the hoisting machinery in one of the shafts of a mine, in yielding, in the special circumstances, to an impulse to turn his eyes momentarily to the source of a disturbance made by "clapper-

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boards" which were out of order, was not an act of such culpability as to fall within the category of criminal negligence. The proposition that, by force of secs. 247 and 284 of the Criminal Code, neglect of such a character as to give rise to civil responsibility gives rise to criminal responsibility also, is not maintainable. *McCarthy v. The King* (1921), 62 Can. S.C.R. 40, explained. The view expressed in *Union Colliery Co. v. The Queen* (1900), 31 Can. S.C.R. 81, at pp. 87 and 88, that sec. 247 (then sec. 213) is a "mere statutory statement of the Common Law," approved.

APPEAL by the Attorney-General for Ontario from the judgment of the Appellate Division of the Supreme Court of Ontario, 63 O.L.R. 275.

February 5. The appeal was heard by DUFF, MIGNAULT, NEWCOMBE, LAMONT, and SMITH, JJ.

*Edward Bayly*, K.C., for the appellant.

*J. J. O'Connor*, for the defendant, respondent.

March 20. The judgment of the Court was read by DUFF, J.:—There is no material dispute as to the primary facts. On the day the offence is alleged to have been committed, the hoisting machinery in one of the shafts of the Frood Mine was in operation raising muck from the bottom of the shaft. The accused was the hoistman in charge of this machinery. There were two cages or skips raised and lowered simultaneously, at the same rate of speed, by the same machinery. Part of the duty of the hoistman was to arrest the machinery as the descending skip was nearing the bottom of the shaft, to give warning of its approach to the workmen engaged there. On the occasion in question, this precaution was not observed, and one of the workmen, caught unawares, was struck by the skip and killed.

There was a dial which shewed the position of the skips at any moment, and a buzzer which, when working, announced the arrival of the skips at points 100 feet from the top and bottom respectively. On the occasion with which we are concerned, the buzzer was out of order.

It was the duty of the hoistman to follow the ascent and descent of the skips, and for this purpose to give close attention to the dial; but, on the occasion in question, the attention of the accused was diverted for a moment, and during that moment the descending skip reached a point so near the bottom of the shaft that, when his attention to the dial was restored, he was too late, with the means at his command, to bring the skip to rest and avert the tragedy.

The Mining Regulations require the arrest of the descending skip for the protection of workmen engaged below, and the duty

to conform to the regulations is a duty of the strictest order. It is indisputably one of those duties contemplated by secs. 247 and 284 of the Criminal Code. The question to be considered is, whether the momentary inattention of the hoistman involved, in the circumstances, a breach of duty of the kind that entails criminal responsibility.

The accused was an experienced hoistman, and admittedly had been most conscientious in the performance of his duties. His explanation of his conduct is that his attention was attracted by a violent noise proceeding from some appliances known as "clapperboards," situated behind him, which appear to be groups of electrical contactors controlling the hoisting apparatus. It was the duty of the hoistman to report any irregularities in the working of the machinery, and these "clapperboards" had been reported upon, but there had been some difficulty in precisely identifying the nature of the defect. There are two sets of such appliances, and there had been some doubt as to which of these was the seat of the trouble. With this in his mind, on hearing the noise on the day of the accident, his attention was immediately attracted with more than usual force to the "clapperboards." It is conceded that, when these "clapperboards" are out of order, the noise proceeding from them may be of a violent and disturbing nature. The official inspector and the mining officials agree that this noise might be expected to produce some distraction of the hoistman's attention; that, in the situation of the accused, only a man of very steady nerves would be proof against the impulse to turn his eyes to the source of the disturbance.

The almost involuntary act of the accused in yielding, in the special circumstances, to this impulse, does not appear to be an act of such culpability as falls within the category of criminal negligence. On this point the decision of the Court below is manifestly right.

The contention advanced on behalf of the Attorney-General is, that, by force of secs. 247 and 284 of the Criminal Code, criminal responsibility ensues when there is neglect of a duty to exercise reasonable care in the control of a thing which, in the absence of such care, may endanger human life; and that—at least where (as here) no question of skill is involved—neglect of such a character as to give rise to civil responsibility gives rise to criminal responsibility also. In support of this proposition, the decision of this Court in *McCarthy v. The King* (1921), 62 Can. S.C.R. 40, is cited.

This is a misapprehension of the effect of *McCarthy's* case.

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S.C. Can. Two of the Judges who took part in that decision expressed the  
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the ground of the decision. In that case the Court had to consider the charge of a trial Judge in a prosecution for manslaughter in these circumstances: the accused, driving an automobile in a frequented street at about 12 miles an hour, ran into a workman, working in a manhole in the street, and killed him. The manhole was covered by a tarpaulin tent about 3 or 4 feet wide at the bottom, 5 or 6 feet high, and several feet long. The vision of the accused was obstructed owing to the dirty condition of his windshield, and for this reason, he said, from time to time he looked out from the side of the car, but failed to observe the tarpaulin covering the manhole. The trial Judge instructed the jury that, if the death of the deceased was due to "some want of ordinary care which an ordinarily prudent man would have observed in the driving of the car," it was their duty to convict. He directed their attention to the distinction between the degree of negligence required to affect a defendant with liability in a civil case, and the culpable negligence required to justify a conviction in a criminal case; he presented to them, as the cardinal issue, the question whether the accused was maintaining a "proper lookout;" and he told them that, if they were convinced that the accused, if he "had been looking ahead at all as a driver of a motor-car should have looked ahead," would have seen the obstruction in the street, they would be justified in finding him guilty of "culpable negligence."

The trial Judge reserved a question as to the correctness of his instruction touching "the negligence which under the circumstances of the case would render the accused guilty of manslaughter."

The question so stated was the subject of the inquiry in this Court, and that inquiry involved an examination of the effect of the sections of the Criminal Code above mentioned, as applied to the facts in evidence and the charge of the trial Judge. The Court was unanimous in the view that failure to maintain a "proper lookout" amounted, in the circumstances, to culpable negligence within the contemplation of the criminal law, and that, speaking more generally, a want of ordinary care, in circumstances in which persons of ordinary habits of mind would recognise that such want of care is not likely to imperil human life, falls within that category. But the decision does not attempt to lay down an abstract rule for determining the incidence of criminal responsibility for negligence.



This is all that is necessary for the disposition of the appeal. We think it right to add that we see no reason to differ from the view expressed by Sedgewick, J., speaking for the majority of this Court, in *Union Colliery Co. v. The Queen* (1900), 31 Can. S.C.R. 81, at pp. 87 and 88, that sec. 247 (then sec. 213) of the Criminal Code is a "mere statutory statement of the Common Law."

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*Appeal dismissed.*

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[ROSE, J.]

ELDRIDGE v. TOWN OF SOUTHAMPTON.

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March 27.

*Municipal Corporations—Contract of Town Corporation with Hydro-Electric Power Commission—Vote of Electors upon Question Submitted—Class Entitled to Vote—"Electors of the Municipality"—Persons Entitled to Vote on Money By-laws—Power Commission Act, secs. 43 (3), 53—Municipal Act, sec. 1 (d), (k)—Injunction—Debenture By-law—Motion to Restrain Council from Passing—Procedure in Attacking Vote Taken on By-law—Approval of Contract by Lieutenant-Governor in Council—Discretion.*

On the 26th November, 1928, a vote of the electors of the town of S. was taken upon the question, "Are you in favour of securing a supply of electrical power or energy from the Hydro-Electric Power Commission of Ontario?" resulting in an affirmative answer. On the 11th March, 1929, a by-law for the issue of debentures was submitted to the vote of the ratepayers and approved. The plaintiffs, electors of S., brought this action on their own behalf and on behalf of all the other electors, against the town corporation, for a declaration that the vote taken on the by-laws was invalid and that the by-law was defective; for a declaration that the question submitted in November was improperly submitted to the vote only of the electors entitled to vote in respect of money by-laws, whereas it ought to have been the vote of all the electors; for an injunction restraining the municipal council from passing or acting upon the debenture by-law; and for an injunction restraining the defendants from entering into a contract with the commission. An interim injunction was granted by a Local Judge restraining the defendants from entering into the contract; but he refused to grant an injunction in respect to the by-law. Upon a motion to continue the injunction granted and for an order granting the other injunction:—

*Held*, having regard to the provisions of sec. 43 of the Power Commission Act, R.S.O. 1927, ch. 57, and sec. 1 (d) and (k) of the Municipal Act, R.S.O. 1927, ch. 233, that the "electors of the municipality" (sec. 43 (3)) are those persons who in respect of the particular municipality are electors; and in the present case they are those persons who in S. are entitled to vote on money by-laws.

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There was no reasonable basis for the contention that the vote ought to have been the vote of the "municipal electors" (sec. 1 (k) of the Municipal Act); and the motion to continue the injunction in respect of the contract was dismissed.

The concluding words of sec. 43 (3)—"such contract shall be valid and binding"—can have no effect unless the prescribed conditions have been complied with.

Section 53 of the Power Commission Act confers upon the Lieutenant-Governor in Council a certain discretionary power to approve and make binding a contract concerning the validity of which, without such approval, there may be a question; and the Court will not, upon a suggestion that the executive power may be exercised unwisely, restrain the making of a contract which, when made, may be submitted for approval.

The motion for an injunction restraining the council from passing the debenture by-law, based upon allegations of irregularities in the taking of the vote, defects of form in the by-law, and failure to take the steps preliminary to the submission of the by-law, was also refused. If and when the by-law is passed it can be attacked in the usual manner.

MOTION made on behalf of the plaintiffs for an order continuing, until the trial of the action, an injunction granted by the Local Judge at Walkerton, restraining the defendants from entering into a contract with the Hydro-Electric Power Commission of Ontario for the transmission and supply of electrical power by the commission for the use of the corporation; and also for an order restraining the council from passing or acting upon a certain by-law providing for the issue of debentures.

The motion was heard by ROSE, J., in the Weekly Court, Toronto.

*H. H. Davis*, K.C., for the plaintiffs.

*W. N. Tilley*, K.C., for the defendants.

March 27. ROSE, J.:—The plaintiffs, alleging that they are the owners of property in and electors of Southamptón, sue on their own behalf and professedly on behalf of all the other electors for a declaration that the vote of the ratepayers, taken on the 11th March, 1929, on the by-law for the issue of debentures, was invalid for certain reasons set out in the endorsement on the writ of summons and that the by-law is defective in certain respects; for a declaration that the vote of the electors taken on the 26th November, 1928, upon the question, "Are you in favour of securing a supply of electrical power or energy from the Hydro-Electric Power Commission of Ontario?" was the vote only of the electors entitled to vote in respect of money by-laws, whereas (according to the plaintiffs' contention) it ought to have been the vote of all the electors; for an injunction restraining the council

from giving a third reading to and from passing or acting upon the debenture by-law; and for an injunction restraining the corporation from entering into a contract with the commission under the authority of a by-law passed on the strength of the vote taken in November, 1928; and for other relief.

The plaintiffs moved before his Honour Judge Owens for an interim injunction. The learned Local Judge thought, as is set out in his considered judgment, that the plaintiffs were entitled to an injunction restraining the corporation from entering into the contract, but he dismissed the motion in so far as it was a motion for an injunction to restrain the passing of or action upon the debenture by-law. His view was that *primâ facie* the question submitted in November, 1928, ought to have been submitted to the vote of all the electors; that there is reasonable ground for apprehending that, unless restrained, the council will act upon the by-law passed to give effect to the opinion expressed by the majority of those who voted, and that a contract will be entered into with the commission, which contract will, by sec. 43(3) of the Power Commission Act (R.S.O. 1927, ch. 57), be made 'valid and binding,' so that the plaintiffs will be without redress even if at the trial it is held that the question ought to have been submitted to the whole body of the electors. But as to the motion to restrain the council from passing the debenture by-law he pointed out that there was no need for action upon his part, since the plaintiffs, before the third reading of the by-law, would have ample time in which to launch the motion that has been launched and has been heard by me along with the motion to continue the injunction.

The opinion reached by the learned local Judge appears to have been based upon a reading only of the relevant statutes in the form in which they appear in the revision of 1927; the motion before him appears to have been made *ex parte*; and he had to decide without having had the benefit, which I have had, of an historical review of the sections by counsel for the defendants, assisted by some information furnished, in the form of affidavits, by the secretary to the Power Commission. And, as my present opinion of the meaning of the statutes as they stand depends to some extent on the history of the legislation, I deem it proper to begin at the beginning, referring first to the original Acts and last to the words of the Acts as they appear in the revision of 1927.

By the Municipal Amendment Act, 1903 (3 Edw. VII. ch. 18, sec. 105), sec. 33 of the Municipal Act, R.S.O. 1927, ch. 223,

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sec. 533, was amended by adding para. 1a., which provided that the councils of counties, townships, cities, towns and villages were given power to take, at any annual municipal election, the vote of the electors upon any question not specifically authorised by law; to determine whether the vote should be that of the municipal electors generally or that of the electors qualified to vote on a by-law for the creation of debts; and to prescribe the procedure to be taken for such vote; and certain provision was made for the forms of oath to be taken by the voters and certain general provisions of the Act were made applicable. This amendment was carried into the revision of the same year (the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19) as sec. 533 (1a.) The statute, when conferring the power to submit the question, amended the definition of the word "electors;" so that in the interpretation section of the consolidation of 1903 (ch. 19, sec. 2(5)), the term was defined as "the persons entitled for the time being to vote at any municipal election, or in respect of any by-law, resolution or question (as the case may be)."

Power to create a Hydro-Electric Power Commission was conferred upon the Lieutenant-Governor in Council by a statute passed in 1906 (6 Edw. VII. ch. 15). The statute of 1906 was replaced in 1907 by the Power Commission Act, 7 Edw. VII. ch. 19. Under that Act (sec. 12) any municipal corporation might apply to the commission for the transmission and supply of electrical power or energy. Upon receipt of the application the commission was to furnish certain information, plans, specifications, and estimates; and, these being furnished, the council might enter into a provisional contract with the commission; but (sec. 13) the provisional contract was not to be binding upon the corporation unless and until a by-law approving the same had been submitted to and had received "the assent in accordance with the provisions of the Consolidated Municipal Act, 1903, of the electors qualified to vote on by-laws for creating debts."

By the spring of 1909, as appears by the preamble to the Act next to be mentioned, a contract with the commission had been executed by many municipal corporations, and other municipal corporations had expressed a desire to execute it; but unforeseen difficulties had caused delay, certain amendments of the contract had become necessary, and it had become desirable to set at rest certain questions that had been raised as to the validity of the contract. Accordingly, the Power Commission Amendment Act, 1909 (9 Edw. VII. ch. 19), was passed. By that Act the contract was amended and was declared to be binding upon certain named



corporations, and all pending actions wherein the validity of the contract or of the execution of it by any of those corporations was called in question were stayed; and it was enacted that if a corporation not a party to that contract as varied should apply for a supply of power, and a question had before the passing of the Act been, or should after the passing of the Act be, submitted to the vote of the electors of the municipality pursuant to para. 1a. of sec. 533 of the Consolidated Municipal Act, 1903 (as amended in 1909 by the deletion of the words "at any annual municipal election"), as to a supply of power from the commission, and the electors had voted in favour of such a supply, then the council might authorise the entering into and the corporation might enter into a contract with the commission in the form given in the Act or with such variations as might be approved by the Lieutenant-Governor in Council, without submitting a by-law approving the same for the assent of the electors as provided by sec. 13(1) of the Power Commission Act, and that when executed such contract should be legal, valid and binding.

It is to be noted particularly that in the section just described the enactment was, that if a question had been submitted to *the electors* pursuant to sec. 533 of the Consolidated Municipal Act, 1903, and *the electors* had voted favourably, then the council might contract with the commission without submitting a by-law approving the contract for the assent of *the electors* as provided in the Power Commission Act of 1907. But *the electors* whose approval of the provisional contract was required by the Act of 1907 were "the electors qualified to vote on by-laws for creating debts;" so that the approval of *the electors* that was dispensed with by the Act of 1909, in those cases in which approval of the proposal to obtain a supply of power had been expressed by *the electors*, were the electors qualified to vote on by-laws for creating debts. And since, unless the context otherwise requires, a word ought to be given the same meaning wherever it occurs in one section of a statute, and since there was no difficulty under sec. 533 (1a.) of the Consolidated Municipal Act, 1903, in submitting the question as to the desirability of obtaining a supply of power from the commission to the vote of the electors qualified to vote on by-laws for creating debts, there can, I think, be no doubt that sec. 11 of the Act of 1909 meant that if the question as to the desirability of obtaining a supply of power from the commission had been submitted to the electors qualified to vote on by-laws for creating debts and those electors had expressed their approval, then a contract in the statutory form, or in that form with ap-

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proved variations, might be entered into without first having been submitted for the assent of the same electors. It is in evidence that since 1909 the practice has been to submit to the electors entitled to vote on by-laws for creating debts ("money by-laws") the question, "Are you in favour of obtaining from the Hydro-Electric Power Commission of Ontario a supply of electric power?" That is to say, the procedure set up by the Act of 1907 has not been used since the passing of the Act of 1909, and the question that has been submitted since 1909 has been submitted always to the votes of those electors who are qualified to vote on by-laws for creating debts. It is in evidence also that the numerous contracts which, year by year, have received the sanction of the Legislature are contracts that have been entered into after the submission of the question to this restricted body of electors. It remains to consider whether there is anything in the later legislation to indicate that the practice so long followed (and approved by the Legislature) must now be abandoned.

When the Municipal Act was revised in 1903, the terms "electors" and "municipal electors" were given the definitions that are now to be found in the Act as last revised (R.S.O. 1927, ch. 233, sec. 1(*d*) and (*k*)); and the power of the councils of all municipalities to submit any *municipal* question to the vote of the electors was stated more tersely than in the earlier Act; as framed in 1903, the section is now sec. 396(11) of the Revised Statute.

In the Revised Statutes of 1914, the Power Commission Act is ch. 39. The provisions of the Act of 1907 for entering into a provisional contract and submitting it to the vote of the electors qualified to vote on money by-laws and the provisions of the Act of 1909 for executing the contract without submitting it for approval, provided a question has been submitted and has been answered favourably, are carried into one section (sec. 18) which is divided into 7 subsections, the Act of 1909, however, being somewhat revised, but not subjected to any change that is here material. The provision is that if a question has been submitted to *the electors* the contract may be entered into without the submission of an approving by-law for the assent of "the electors as provided by subsection 4." The "4" is obviously a clerical error; "5" is meant. Subsection 5 is that part of the Act of 1907 which requires the provisional contract to be submitted to the electors qualified to vote on money by-laws. The revision of the Power Commission Act in 1914, therefore, made no change in the law; and, as will appear when the provisions of the present Municipal Act are discussed, no change that has been made in that Act is really material.

It is not necessary to mention such legislation as there was concerning the commission between the revision of 1914 and the legislative session of 1927. In 1927 the Power Commission Act was revised, and the sections that are of importance here took the form in which they appear now in R.S.O. 1927. They will be referred to by the numbers given to them in R.S.O. 1927, ch. 57.

Section 43 of the present Act takes the place of sec. 18 of the Act of 1914. The procedure set up by the Act of 1907 is done away with. The only procedure is now the alternative procedure introduced in 1909. But sec. 43(3), which relates to the taking of the vote, is not as clear as it was before; for now there is no reference back to the subsection that had continued to authorise the following of the procedure first set up in 1907; and if the section is looked at by itself there is room (as appears by the opinion expressed by the learned Local Judge in this case) for such a reading as will make the present Act effective to substitute a new procedure for that followed from 1909 until the present time.

Section 43 authorises any municipal corporation to apply to the commission for the supply of power; requires the commission to furnish a certain estimate; authorises the commission to furnish certain plans, specifications, and information; and continues as follows:—

“(3) The corporation may thereupon submit to a vote of the electors of the municipality, in accordance with the provisions of the Municipal Act, a question as to securing a supply of electrical power or energy from the commission; and if a majority of the electors vote in the affirmative, the council of the corporation may, by by-law, authorise the entering into, and the corporation shall thereupon enter into, a contract with the commission in such form as may be approved by the Lieutenant-Governor in Council, and it shall not be necessary to submit a by-law approving thereof for the assent of the electors, and such contract shall be valid and binding.”

The vote on the question is to be the vote of *the electors*, and the assent that is dispensed with is the assent of *the electors*; but there is not, as heretofore, in the subsection itself anything that makes it appear that the electors whose assent is dispensed with are those electors who are qualified to vote on money by-laws; and so, while, presumably, the word *electors* is to be given the same meaning throughout, there is not in the subsection itself a statement of that meaning. Nevertheless I think that the meaning may be found even without resort to the history of the subsection.

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Some meaning must be attributed to the words, "it shall not be necessary to submit a by-law approving thereof for the assent of the electors." The meaning was quite plain so long as the procedure established by the Act of 1907 remained available. But now that that procedure has been abolished, the Legislature must have had some reason for retaining the words, and that reason lies, I think, in the fact that by the contract with the commission the corporation necessarily incurs a debt the payment of which is not provided for in the estimates of the current year, so that by sec. 297 of the Municipal Act the assent of *the electors* is required (see *per* Meredith, C.J.C.P., in *Horrigan v. City of Port Arthur* (1909), 14 O.W.R. 1087—the reports of this case in 14 O.W.R. are fuller than those in 1 O.W.N. 169, 216—), and, the by-law approving the contract being a "money by-law" (sec. 1 (*i*)), the electors who are to assent are those who are entitled to vote on money by-laws (sec. 1 (*d*)). A definition of the word *electors* where last used in sec. 43(3) being thus found, the same definition ought to be applied to the same word where first used in the subsection unless there is something requiring a different reading. It is contended that the relevant part (sec. 1 (*d*)) of the interpretation section of the Municipal Act, which section is by the Interpretation Act, R.S.O. 1927, ch. 1, sec. 33, made to extend to all Acts relating to municipal matters, does require a meaning different from that just indicated to be attributed to the word *electors* where first used in sec. 43(3) of the Power Commission Act. Section 1 (*d*) of the Municipal Act is as follows:—

"In this Act . . . . (*d*) 'Electors,' when applied to a municipal election, shall mean the persons entitled to vote at a municipal election, when applied to voting on a money by-law shall mean the persons entitled to vote on the by-law and when applied to voting on any other by-law or on a resolution or question unless otherwise provided by the Act, by-law, or other authority under which the vote is taken, shall mean municipal electors."

The voting now under consideration is a voting, not on a money by-law, but on "a question," and, "unless otherwise provided by the Act, by-law, or other authority under which the vote is taken," the electors who are to vote are the municipal electors, i.e., "the persons entitled to vote at a municipal election:" sec. 1 (*k*). In fact the by-law under which the vote was taken did "otherwise provide:" it ordered the submission of the question to the vote of the electors entitled to vote on money by-laws; but that circumstance does not seem to be of great importance; for if the statute contemplates the submission of the question to the "muni-



cipal electors," a vote of the electors qualified to vote on money by-laws cannot well be said to be made effective by the order of the council. But I think that it is otherwise provided by the *Act* under which the vote was taken—the Power Commission Act. It is true that the provision in the Power Commission Act is not express; a simple provision for taking the vote of *the electors* may, according to circumstances, be a provision for taking the vote of any one class of several classes of persons. But, if my reading of sec. 43(3) of the Power Commission Act is correct, the provision for taking the vote of the electors is in fact a provision for taking the vote of the electors qualified to vote on money by-laws; so that, by the subsection, correctly read, it is provided that the vote shall not be the vote of the "municipal electors." The power by sec. 43(3) conferred upon the council is a power to submit the question to a vote of "the electors of the municipality." If it had been a power to submit the question to a vote of "the municipal electors," probably sec. 1(k) of the Municipal Act would have applied and the power would have been held to be a power to submit the question to a vote of the persons entitled to vote at a municipal election. But the "electors of the municipality" are those persons who in respect of the particular municipality are *electors*; and in the present case I think they are those persons who in Southampton are entitled to vote on money by-laws.

On an interlocutory motion it is well to refrain, if possible, from expressing an opinion that may embarrass the Judge presiding at the trial. Therefore, I should have been glad to find a way of avoiding the foregoing discussion. But the right to enter into contracts ought not lightly to be interfered with; and I have felt bound, in deciding whether the injunction ought to be continued, to ascertain whether there is any reasonable ground for the contention that the first of the steps preliminary to the execution of the contract mentioned in sec. 43(3) of the Power Commission Act has not been taken. And, after all, the reason that ordinarily exists for refraining at this stage from expressing an opinion hardly exists in the present instance; for the question is purely one of law, and the answer cannot depend to any extent upon a finding of facts at the trial. In my opinion, there is no reasonable basis for the contention that the vote ought to have been the vote of the "municipal electors;" and the motion to continue the injunction must be dismissed.

The learned Local Judge was impressed by the concluding words of sec. 43(3): "such contract shall be valid and binding." He feared that, if the corporation entered into the contract with

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the commission, the contract would be held to be binding even if it should be determined that the preliminary vote taken was not the vote contemplated by the statute. With respect, I have no such fear. What the statute says is that the question may be submitted to the electors and that if the electors express their approval the council may authorise and the corporation may enter into a contract which contract shall be valid and binding. But it is only if there have been the submission, the vote, and the approval, that the contract is to be valid; and, as I read the subsection, the concluding words can have no effect unless the prescribed conditions have been complied with, and, in particular, unless there has been a submission of the question to the electors of the prescribed class.

A point that was more strongly urged before me is based upon sec. 53 of the Power Commission Act. By that section it is enacted that if the commission enters into an agreement and the agreement is submitted to and approved by the Lieutenant-Governor in Council it shall thereupon be valid and binding upon the parties and shall not be open to question upon any grounds whatsoever. It is suggested that, if the corporation is left free to execute the contract, application will be made to the Lieutenant-Governor in Council under this section, and that, if his Honour sees fit to approve of the contract, whatever right of attack may at present be possessed by the plaintiffs will be destroyed. To this I attach no importance whatsoever. Section 53 confers a certain discretionary power to approve and make binding a contract concerning the validity of which, without such approval, there may be a question; and it is not the function of the Court to listen to suggestions that the executive power may be exercised unwisely, and because of those suggestions to restrain the making of a contract which, when made, may be submitted for approval.

The motion for an injunction restraining the council from passing the debenture by-law is based upon certain allegations of irregularities, such as proceeding upon an improper list of voters, accepting the votes of unqualified persons, and allowing persons to vote more than once, and upon certain defects of form in the by-law and a certain failure to take the steps preliminary to the submission of the by-law for the approval of the electors. As to this motion it suffices to say that the attack upon the vote ought to be made in the prescribed manner, and not by a motion for an interim injunction; and that it would be ill-advised and irregular to restrain the council from passing the by-law. If and when it is passed it can be attacked in the usual manner.

The motion will be dismissed, with costs to the defendants in any event in the cause.

## [APPELLATE DIVISION.]

## RE PATTON.

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*Will—Construction—Conditional Bequests of Annuities to Son and Grandson—Non-fulfilment of Conditions Applicable to Grandson at Time of Death of Testator—Subsequent Unavailing Attempt to Fulfill—Right of Father to Determine Religion of Infant Son.*

A testator, dying in 1919, left a will made in 1917, by which he directed his executors, "provided my son, . . . now residing at C., Germany, is and remains up to his death a British subject, and is and proves himself to be of the Lutheran religion, to pay to my said son . . . annually and during the term of his natural life the sum of \$1,500 . . . and provided so long as my grandson . . . is and remains until the date of his death a British subject, and is and proves himself to be until the date of his death of the Lutheran religion, to pay to my said grandson . . . for and during the term of his natural life the sum of \$500 a year . . . . On the decease of my said son . . . the above mentioned annuity so to be paid to him, providing the conditions on which said annuity is given have been fulfilled, shall be then paid to my said grandson . . . for and during the term of his natural life on the condition as above mentioned that he is and remains a British subject and is and proves himself to be of the Lutheran religion." The will further provided that upon the decease of the grandson, "he having remained a British subject to the time of his death and having proved himself to be and remaining of the Lutheran religion up to the time of his death," the money set apart to provide the annuity for his father and himself should be distributed among the lawful issue of the grandson as he might by his will appoint, but in the event of the son or grandson "not having remained until the date of their death British subjects and of the Lutheran religion" the bequests made for their benefit should absolutely cease and be of no effect, and the money set apart for their use and benefit should become part of the residuary estate.

The son was always a British subject and of the Lutheran faith and remained so until his death, and the annuity given to him was paid to him so long as he lived. He died in July, 1928. The grandson was an infant at the time of the testator's death. He became of age in January, 1927. His father had brought him up, by his mother's desire, as a Roman Catholic, and he remained of that faith until after he had attained his majority, when he, as he swore, "formally adopted the Lutheran religion:"—

*Held*, by MIDDLETON, J.A., upon an originating motion, that in order to fulfill the conditions upon which the grandson was to take the two annuities, he must be a British subject and of the Lutheran faith at the date of the testator's death; being a British subject, son of a British subject, his father had the right to determine the religion in which he should be brought up; and, as he was a Roman Catholic at the date of the testator's death, he was not entitled to take either annuity.

Upon appeal the members of the Court were divided in opinion, and the judgment of MIDDLETON, J.A., stood.

MOTION by the executors of the will of William Robert Patton, deceased, for an order determining two questions as to the true meaning and effect of the will.



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November 5, 1928. The motion was heard by MIDDLETON, J.A., in the Weekly Court, Toronto.

*G. H. Sedgewick*, K.C., for the executors.

*Charles Kappele*, for William Robert Patton the younger, grandson of the testator.

*Donald Macdonald*, for Annie Louise Carlisle and others,

November 7. MIDDLETON, J.A.:—Motion by the executors for the determination of the questions: firstly, whether William Robert Patton is entitled to have paid to him the annuity of \$500 a year referred to in the will of the testator; and, secondly, whether the said William Robert Patton, upon the death of his father, Robert George Patton, became entitled to be paid the further annuity of \$1,500 referred to in the will of the testator.

William Robert Patton the elder, at the time of his death having a fixed place of abode in the city of Toronto, but being then in England, departed this life on the 26th February, 1919, having first made and published his last will and testament dated the 22nd December, 1917. This will was duly admitted to probate on the 9th June, 1919.

By this will, after certain specific gifts, it is provided that the executors shall invest the proceeds of the estate and from the income derived therefrom, "provided my son Robert George Patton, now residing at Cologne, Germany, is and remains up to the date of his death a British subject, and is and proves himself to be of the Lutheran religion, to pay to my said son Robert George Patton annually for and during the term of his natural life the sum of \$1,500, in quarterly payments, and provided so long as my grandson William Robert Patton, son of my said son Robert George Patton, is and remains until the date of his death a British subject, and is and proves himself to be until the date of his death of the Lutheran religion, to pay to my said grandson William Robert Patton for and during the term of his natural life the sum of \$500 a year, payable quarterly."

This is followed by provisions authorising the expenditure of an annuity for the benefit of the grandson until he attains his 25th year. These are not material to the questions now discussed.

The will contains the further clause: "On the decease of my said son Robert George Patton the above mentioned annuity so to be paid to him, provided the conditions on which said annuity is given have been fulfilled, shall be then paid to my said grandson William Robert Patton for and during the term of his natural life on the condition as above mentioned that he is and remains a



British subject and is and proves himself to be of the Lutheran religion.”

The will further provides that upon the decease of the grandson, “he having remained a British subject to the time of his death and having proved himself to be and remaining of the Lutheran religion up to the time of his death,” the money set apart to provide the annuity for his father and himself shall be distributed among the lawful issue of the grandson as he may by his will appoint, but in the event of the son or grandson “not having remained until the date of their death British subjects and of the Lutheran religion” the testator provides that the bequests herein made for their benefit shall absolutely cease and be of no effect, and the money set apart for their use and benefit shall become part of the residuary estate and be paid over accordingly.

The remaining provisions of the will are not material.

Robert George Patton, the son, was always a British subject and remained so until his death. He was also of the Lutheran faith, and remained so until the time of his death, and the annuity given to him was paid to him so long as he lived. He died on the 4th July, 1928, after having sworn to one of the affidavits upon which this motion is based.

William Robert Patton, the grandson, was, at the time of his grandfather's death, an infant, it is said of the age of 13. He became of age on the 5th January, 1927. His mother, I am told, though this does not appear upon the material, was a member of the Roman Catholic Church, and for this reason her son was brought up as a member of that church, and remained a member of it until after he had attained his majority. He then, to quote from his own affidavit, “formally adopted the Lutheran religion,” and has ever since remained and still is solely “a member of the said Lutheran religion.” In this he is confirmed by his father's affidavit, and also by the affidavit of a clergyman of the Protestant Lutheran Church at Cologne. He fixes the date upon which he “formally adopted the Lutheran religion” as the 30th January, 1927.

The reason for the delay in the change of faith is thus described by the grandson, who, after stating his knowledge of the condition in the will and his willingness and anxiety to comply therewith, adds: “But, being a minor and still under the age of 21 years at the time of my said grandfather's death, I was not able or qualified by reason of the laws in force in the city of Cologne, the place of my domicile, to adopt the Lutheran religion and so comply with my grandfather's said will as literally construed, which, however,

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Middleton, I verily believe is not the way my grandfather intended his said  
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This statement is confirmed by the father, who states that his son, "although perfectly willing to change his religion from that of the Roman Catholic to the Lutheran religion, was unable to do so by reason of his minority." This statement is in conflict with communications received by the trust company from the father.

On the 26th September, 1919, the father wrote:—

"As to my son, I add that he is of the Roman Catholic faith. The reason that I had to educate my son in that faith I had in time explained to my father, who has agreed to it. . . . I say that I shall give the boy after he has left high school the religion required by his grandfather."

On the 8th March, 1922, he wrote:—

"I beg to inform you that William Robert Patton, grandson of W. R. Patton, is about to leave school and will therefore no longer be any hindrance to his complying with the conditions stipulated in the last will of his grandfather and becoming Lutheran. . . . I trust the certificate of the British Consulate confirming his change of religion and adoption of the Lutheran faith will suffice for your purposes."

There is no difficulty in the son's way by reason of the requirement of the will that he should be of British citizenship. His father was a British subject, and this fact governs. Affidavits have been filed with reference to the German law which are in some respects in conflict, but on the view that I take of the case this conflict is not material. A child is under the control of its parents so long as it is under age, and the care of the child includes, so far as the father is concerned, the right to determine the child's religion, and it is quite evident that here the father thought it expedient that the child should be brought up as a Roman Catholic. This was probably with the concurrence of the child's mother, and because of her natural desire that her child should be brought up in her own religion. It is, as appears from the affidavits, possible that in the event of difference of opinion between the father and mother, a German court might have interfered.

It is, however, clear to me that, this child being a British subject, son of a British subject, his father had the right to determine the religion in which the child should be brought up, this being the English law. I do not know when the child could have emancipated himself from this parental control, had he chosen to assert himself, but apparently all acquiesced in the child being

and continuing a Roman Catholic until after he attained his majority. I do not know whether any real change then took place, owing to the repeated use of the word "formally" in connection with the supposed change.

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In my view this question does not really arise, because I think, according to the true interpretation of the will, the question must be determined once and for all at the death of the testator.

I have searched for authorities and have read many, but can find none which throws any real light upon the problem submitted, and I think the will must, in the end, be interpreted by the expressions used, due regard being had to the surrounding circumstances.

The testator was evidently dominated by two main ideas. He was a British subject, and he did not desire any of his money to go to any one other than a British subject. He feared that his son, resident in Germany and apparently married to a German woman, might have abjured his British allegiance; he was also opposed to the Roman Catholic religion and desired that nothing should go to his son unless his son adhered to the Lutheran faith. He had a like feeling with regard to his grandson, and so with regard to each he makes it a condition precedent that neither shall take unless he is a British subject at the date of the will or at the date of the death—it makes no difference here which date is adopted—and he likewise stipulates that neither the son nor the grandson is to take unless he is and remains of the Lutheran faith. In this way he makes it a condition precedent to anything being taken by the son or grandson that he is a British subject and of the Lutheran faith at the date of his death, and he makes it a condition subsequent governing the various payments of the annuity provided for that each shall continue, remain, and prove himself to be a member of the Lutheran religion. Failing this he will take nothing further.

The condition is made a *sine quâ non*, failing which no benefit is given. The testator has not placed himself in the position of offering a price to his son or to his grandson to abjure the faith held at the date of his death. He had been, no doubt, most anxious concerning this matter, and had in the end determined that the son and grandson should have the benefit contemplated or should take nothing, this to be determined by the facts as they are at the date the will becomes operative.

I cannot see my way to read the will as meaning, "This is given to my grandson if he elects to become a member of the Lutheran Church." He is only to have the benefit if he is of that church at the time the will speaks—the death of the testator.

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It was argued, and was forcibly argued, that a different consideration might be applied to the gift to the grandson of the son's legacy upon his death, but on the best consideration I can give the matter the words "that he is and proves himself to be of the Lutheran religion" are dominated and controlled by the expression accompanying them, "as above mentioned," which I think removes all ambiguity and makes the condition referable to the death of the testator, and not to the death of his son.

It appears that on the 24th December, 1917, the testator wrote a letter addressed to his son, to be delivered to him upon his decease, and it is sought to use this letter to aid in the interpretation and to control the meaning of the words of the will. Plainly this cannot be done. If the letter is looked at, it is found to be of no assistance. It was intended to be an explanation by a father to the son of the grievance underlying the making of the will.

There will be, therefore, a declaration that the grandson is not entitled to take either the \$500 legacy or the \$1,500 legacy.

Not without some hesitation, I direct costs of all parties to be paid out of the estate, those of the executors to be taxed as between solicitor and client.

William Robert Patton, the grandson of the testator, appealed from the order of MIDDLETON, J.A.

January 10, 1929. The appeal was heard by LATCHFORD, C.J., RIDDELL, ORDE, and FISHER, JJ.A.

*J. H. Fraser*, K.C., and *C. Kæpfele*, for the appellant, argued that the evidence shewed that the testator knew that his grandson was being brought up a Roman Catholic, and in making his will in the form he did it was clear that he wished to win his grandson over from the Roman Catholic to the Lutheran religion. The will could not be construed to mean that the qualifications of nationality and religion must exist when the will was made: *Re Milne* (1887), 57 L.T.R. 828. The evidence shewed that the appellant was an infant, 13 years old, at the time of the testator's death, and not in a position to comply with the conditions in the will until 21 years of age, when he did so comply. Reference to *Re Kenna* (1913), 29 O.L.R. 590; Halsbury's Laws of England, vol. 28, p. 592; *Partridge v. Partridge*, [1894] 1 Ch. 351; *In re Edwards*, [1910] 1 Ch. 541; *In re Quintin Dick*, [1926] Ch. 992.

*Donald Macdonald*, for Annie Louise Carlisle and others, respondents, contended that the judgment appealed from was right for the reasons stated therein. The time for determining whether



the grandson was to take or not was at the date of the will or the date of the testator's death. At that time he had to be a Lutheran. He was not. His father had the right to determine his son's religion. These considerations applied not only to the \$500 legacy but to the \$1,500 legacy, because the words, "that he is and proves himself to be of the Lutheran religion," are controlled by the words accompanying them "as above mentioned," making the condition referable to the death of the testator, and not the death of his son.

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*G. H. Sedgewick*, K.C., for the Toronto General Trusts Corporation, the executors, said that the corporation was interested only in respect of the appellant's claim to be paid \$500 per year from the date of the death of the testator. The corporation had paid over all the income of the estate to the person entitled on the footing that the appellant was a Roman Catholic and therefore not entitled to the annual payments provided for him by the will. In respect of this part of the case the corporation supported the judgment appealed from.

April 5. LATCHFORD, C.J.:—Appeal by William Robert Patton from the judgment pronounced by Mr. Justice Middleton on the 7th November, 1928, on an originating motion for the determination of certain questions arising in the administration of the estate of William Robert Patton, deceased.

The questions were whether, under the will of the deceased, his grandson, the present appellant, was entitled to two annuities, one of \$500 and the other of \$1,500.

They were carefully considered by my learned brother Middleton, who decided that to neither annuity had the grandson any right.

I concur so completely in the reasons stated for reaching that determination that I find myself unable usefully to qualify them by substituting or adding a single word.

Accordingly I think the appeal should be dismissed with costs, those of the executors on a solicitor and client basis.

ORDE, J.A.:—The facts and the provisions of the will in question are so fully set forth in the judgment of my brother Middleton that they need not be repeated.

The argument in support of the appeal developed into two branches. The first was based upon the fact that William Robert Patton, the testator's grandson, was an infant when the will was made and at the date of the testator's death. The other applied only to the legacy of the \$1,500 annuity to the grandson, which was

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to take effect upon the death of the latter's father, Robert George Patton, and involved the question whether the condition applied as of the death of the testator or as of the date when the annuity would first become payable to the grandson.

Upon the first branch several arguments were presented. It was urged that, the grandson being an infant, his religion must be deemed to be that of his father, who was a Lutheran, and not that in which he was in fact being brought up at the testator's death, namely, that of the Roman Catholic Church, which was the religion of his mother. It was further argued that by reason of his infancy at the testator's death the appellant had a right to elect as to his religion at his majority, and that pending that election the condition as to his religion was suspended, and it was urged in support of this contention that, as the testator must have known that the appellant was being brought up as a Roman Catholic (there is no evidence that he did know), he must have intended that the grandson would have an opportunity, when of age, of deciding for himself what his religion should be. And it was further contended that an infant has no religion, and that therefore the question as to his religion must be left for determination until he is of age.

To all these arguments there is, I think, but one answer. The conditions as to nationality and religion are clearly conditions precedent, and so far as they govern the grandson's right to the annuity of \$500, which takes effect immediately upon the testator's death, they are imperative. Unless the grandson came within their terms, the legacy failed completely. The father's letters, which are quoted in the judgment below, and the father's affidavit made while this motion was pending, to say nothing of the grandson's admissions, establish beyond question that the appellant was not a Lutheran at the testator's death and did not become one until after his own majority about 5 years later. When he attained his majority he was admittedly a Roman Catholic.

None of the authorities cited by counsel for the appellant lend any colour to the argument that an infant, by making some declaration at his majority as to what his religion should thereafter be, could alter the fact as to what it was, or was not, at some earlier period. In the absence of evidence to the contrary, there might perhaps have been a presumption that his religion as an infant was that of his father. But here the fact that the appellant was not a Lutheran when the testator died is beyond question.

The argument that an infant could have no religion really

defeated itself, because if that theory were sound, then the gift must fail because the condition that he must be a Lutheran would not have been fulfilled.

As to the other branch of the appeal, which affects the annuity of \$1,500, the case is not so clear. The language of this gift is as follows:—

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“(d) On the decease of my said son Robert George Patton, the above mentioned annuity so to be paid to him, provided the conditions on which said annuity is given have been fulfilled, shall be then paid to my said grandson William Robert Patton for and during the term of his natural life, on the condition as above mentioned, that he is and remains a British subject, and is and proves himself to be of the Lutheran religion.”

This gift, being an annuity taking effect only upon the death of the donee's father, and lasting only during the donee's lifetime, must by its very nature be contingent upon the donee's surviving his father. There could be no vesting prior to that date, because until the father died there was nothing to vest. Apart from any effect which may be given by the phrase “as above mentioned,” by which the language of the condition is extended so as to comprehend that in which it was already expressed in para. (c), the condition, standing alone, would, I think, be construed as of the date when the gift would take effect, so that if, at his father's death, the grandson was a British subject and a Lutheran, as in fact he was at that time, the gift would take effect. The exact meaning of the phrase “as above mentioned” is not quite clear. It may be intended merely to import into the condition those words in para. (c) which are omitted in para. (d), namely, “until the date of his death.” But the words seem to indicate something more and to be intended to connect the conditions governing the one gift with those governing the other, so as to make them uniform, and so that the two gifts would stand or fall together.

That this was the testator's intention is made clearer when para. (e) is considered. By that paragraph it is provided that upon the death of the grandson, “he having remained a British subject up to the time of his death and having proved himself to be and remaining of the Lutheran religion up to the time of his death,” the money set apart for the payment of the \$1,500 annuity to the appellant's father and himself is to be distributed among such of the appellant's “lawful issue (child or children)” as he shall by his will appoint. This power of appointment was, I think, exercisable during the lifetime of the father of the appellant.

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There is nothing to indicate that the power was to be dependent upon the grandson's surviving his father. It is a power of appointment over the capital of the fund set apart to produce the annuities, and I think clearly enabled the appellant by his will to appoint the fund in favour of such of his own children as he wished, whether he died before or after his father. That being so, it is quite clear that the power of appointment was subject to the same condition as to nationality and religion as the annuities, and that that condition operated from the moment of the testator's death. In these circumstances the testator could not have intended that, while the appellant might have failed to establish a right to the immediate annuity of \$500 and also any right to exercise the power of appointment given by para. (e), he might nevertheless qualify himself for the postponed annuity of \$1,500 by changing his religion before it became effective. I agree with my brother Middleton that the testator intended the conditions upon which the gifts to the grandson were to be dependent to be applied uniformly and to be effective at his death as to all the benefits conferred upon the grandson.

For these reasons, I would dismiss the appeal with costs.

FISHER, J.A.:—I am, with respect, of the opinion that the construction placed upon the will of the deceased by Middleton, J.A., in his very full and careful judgment, does not accord with the intention of the testator.

All the facts are fully set out in the judgment appealed from. Middleton, J.A., construed the will as meaning that the \$500 annuity given to the grandson failed because he was not, at the death of the testator, either a British subject or a Lutheran, thinking that the words "is a British subject" and "is a Lutheran" related and must be confined to the time of the testator's death. If the construction of my brother Middleton is the right one, it is evident that the testator's emphatic and repeated intentions will be defeated; and, for the reasons I am about to give, I adopt the construction which will carry them out. The duty of the Court is to give effect to the testator's will, and the task is to discover his intentions, his real will. To do this the intentions and purposes of the will and the circumstances surrounding the testator at the time the will was made must be considered. The testator was a British subject, residing in Toronto, Canada; his only descendants were his son and his grandson, and he naturally desired to provide for them. There were difficulties in his way, as his son was married to a woman who was a Roman Catholic and evi-



dently a German, and all three were residing in Germany; the grandson was about 13 years of age, and at the time the will was made was being brought up by his mother, apparently under some arrangement or at all events without objection by the husband, as a Roman Catholic; and at that time the Great War was going on, and because of the many repetitions in the will it is manifest that the testator entertained a strong animosity towards Germany and the Germans, and determined upon excluding his only flesh and blood from getting as much as a dollar from him unless they were British subjects and Lutherans, as opposed to the Roman Catholic religion.

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According to the uncontradicted evidence, the testator knew the circumstances under which the grandson was, under his mother's direction, being brought up in the religion of the Roman Catholic Church. Notwithstanding all this, the testator had the natural desire to provide for his own flesh and blood, but there must be loyalty to the testator's country and to the Lutheran Church. In these circumstances he had his will prepared, and provided in it that, if they remained or became, and as long as they remained, British and Lutheran, they should have the benefits of his will, and failing these qualifications they would receive nothing. A reasonable inference, I think, is that the testator believed his son and grandson would comply with his desires, as there was apparently nothing to prevent but the nationality and religion of the mother, and he believed that these would be overcome when the grandson was free to act for himself. Is that not exactly what happened? The grandson, after attaining his majority and before his father's death, became a Lutheran—as he and the Lutheran Minister have without contradiction testified—and was and still is a British subject; and so he then became and now is qualified to receive the bounty of his grandfather. The gifts are to William Robert Patton, a British subject and a Lutheran—the appellant is that person, and if he were not a British subject and a Lutheran he would not be the beneficiary named in the will. The provision for payment of the annuity to the mother until the son attained the age of 25 years is quite in keeping with all this, and in making the annuity payable to her, I believe he thought that might induce her for her son's sake and her own to forgo her Church affiliations.

I cannot find anything in the will opposed to this view: the controlling words in the gift to the grandson of the \$500 annuity are, not the word "is" twice used, but are "so long as my grand-

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1929. "is" and that he is to continue so until his death.

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Fisher, J.A. The disposition of the \$1,500 annuity, which comes under clause 3 of the will, remains to be considered. The father died, and, as stated, no question arises that the grandson had not become a British subject and a Lutheran. The words used by the testator in this paragraph are "on the condition, as above mentioned, *that he is and remains a British subject and is and proves himself to be of the Lutheran religion.*" It seems to me that these words are entirely in accord with the views expressed as to the testator's general intention, and I cannot see what excuse there is for not giving effect to the specific qualification "that he is and remains a British subject and proves himself to be of the Lutheran religion," nor can I understand why any particular date should be selected when the beneficiary must be qualified or lose all. It is not as if there was one gift only—the gifts are annual gifts. Why should the grandson forfeit all even if he had not qualified for the first?

Middleton, J.A., has said that these beneficiaries must be qualified at the death of the testator instead of at the time when they are to receive the money, because the will speaks from death. Wills do not speak from death unless the testator shews by his will that they are so to speak, but even the Legislature (Wil's Act, R.S.O. 1927, ch. 49, sec. 26(1)), in giving that effect to them as to the real and personal property comprised in them, makes them still speak from the time of the making of them, but provides that they shall speak and take effect as if made immediately before the testator's death. I do not see how it is possible to construe the will as meaning that the qualification of nationality and religion was to exist when the will was made, because the testator knew that it did not and was not likely to exist until the grandson should be free to act for himself, and for like reasons, under the known circumstances, to fix the time as that of the testator's death. In other words, the testator knew that a literal compliance would be impossible without any fault of the grandson.

In my opinion, the grandson did all that which he was required to do as soon as it was possible for him to do it, and that is a sufficient compliance with the testator's wishes.

The results of my conclusions are that the appellant is entitled to all payments of the \$500 annuity that have come due since he qualified, and as to the \$1,500 annuity he is entitled to all payments that have come due since his father's death and to all the

benefits of the will as long as he remains a British subject and a Lutheran. App. Div.  
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The appeal should be allowed with costs.

RIDDELL, J.A.:—I concur in the reasoning and result of my brother Fisher's judgment. RE  
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*The Court being divided, appeal dismissed without costs.*

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[APPELLATE DIVISION.]

KEEWATIN POWER CO. LTD. v. KEEWATIN FLOUR MILLS LTD. 1929.

KEEWATIN POWER CO. LTD. v. LAKE OF THE WOODS MILLING CO. LTD. April 5.

*Water—Power-rights—Crown Grant—Claim to Exclusive Use of Waters of Lake—Evidence—Alterations in Mill-races—Injury to Plaintiffs—Onus—Reference as to Damages.*

Upon the plaintiffs' appeal from the judgment of GRANT, J. (1928), 61 O.L.R. 363, it was *held*, affirming that judgment, that the plaintiffs were not, upon the evidence, entitled, as against the defendants, to the exclusive use of the waters of the Lake of the Woods.

Upon the defendants' cross-appeal from the same judgment, it was *held*, reversing it in that respect, that the onus of proving damage for injury resulting to the plaintiffs by changes made in the mill-races was upon the plaintiffs, and they had not shewn solid grounds for being allowed a reference as to damages.

Appeals by the plaintiffs and cross-appeals by the defendants from the judgment of GRANT, J. (1928), 61 O.L.R. 363.

November 13, 14, 15, and 16, 1928. The appeals and cross-appeals were heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and ORDE, J.J.A.

W. N. Tilley, K.C., and C. F. H. Carson, for the plaintiffs, argued the points stated in the reasons for judgment of the Chief Justice, *infra*, and in the course of their argument referred to the following cases in support of the contention that the defendants had no right to divert the waters of the Lake of the Woods: *Pwllbach Colliery Co. Ltd. v. Woodman*, [1915] A.C. 634; *Hanna v. Pollock*, [1900] 2 I.R. 664; *John White & Sons v. J. & M. White*, [1906] A.C. 72.

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*D. L. McCarthy, K.C., C. S. MacInnes, K.C., and Christopher C. Robinson, K.C.*, for the defendants, contended that they had the right to do what they did; that the plaintiffs' power-rights were limited; that, under grants from the Province, the defendants had the right to use the waters of the lake, through the mill-races, as water-powers; that the plaintiffs were estopped by acquiescence from denying them the exercise of their claimed rights; and for the Lake of the Woods Milling Company it was urged that it had the right to the use of the water-power by prescription, having used it for 20 years prior to the commencement of the action; that it was the common intention of the parties to the grant that the defendants should have these power-rights, and evidence outside the grant was admissible to prove it: *Lyttelton Times Co. Ltd. v. Warners Ltd.*, [1907] A.C. 476, 481; *Hunter v. Richards* (1912-13), 26 O.L.R. 458, 28 O.L.R. 267; *Robinson v. Grave* (1872), 27 L.T.R. 648; *Birmingham Dudley and District Banking Co. v. Ross* (1887), 38 Ch. D. 295; *Browne v. Flower*, [1911] 1 Ch. 219; *Gale on Easements*, 10th ed., pp. 92, 118, 140; *Brown v. Alabaster* (1887), 37 Ch. D. 490; *Wardle v. Brocklehurst* (1859), 1 E. & E. 1058; *Bayley v. Great Western Railway* (1884), 36 Ch. D. 434; *Schwann v. Cotton*, [1916] 2 Ch. 120; *Hyatt v. Mills* (1890), 20 O.R. 351; *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool) Ltd.*, [1915] A.C. 599; *Attorney-General to the Prince of Wales v. Collom*, [1916] 2 K.B. 193; *Watcham v. Attorney-General of the East Africa Protectorate*, [1919] A.C. 533. As to acquiescence creating an estoppel against the plaintiffs, counsel referred to *Rochdale Canal Co. v. King* (1853), 16 Beav. 630; *Gale on Easements*, 10th ed., p. 215; *Holker v. Porritt* (1875), L.R. 10 Ex. 59. On the question of prescription reference was made to *Dalton v. Angus* (1881), 6 App. Cas. 740; *Sturges v. Bridgman* (1879), 11 Ch. D. 852; *Smith v. Baxter*, [1900] 2 Ch. 138; *Weld v. Hornby* (1806), 7 East 195, 8 R.R. 608; *Philipps v. Halliday*, [1891] A.C. 228. On the cross-appeals counsel contended that the plaintiffs' action should have been dismissed. The learned trial Judge had referred something which he should himself have determined, and which was part of the plaintiffs' case: *International Bridge Co. v. Canada Southern Railway Co.* (1882), 7 A.R. 226.

April 5, 1929. LATCHFORD, C.J.:—The grounds of the main appeals are the same in both cases. In brief they are:—

1. That the judgment should have declared the plaintiffs entitled to have the waters of the Lake of the Woods flow to their lands without diversion by the defendants.



2. That an injunction should have been granted restraining the defendants from wrongfully diverting water from the plaintiffs.

3. That, if the defendants have rights to divert water, such rights are limited and are not as declared in the judgment.

4. That, the defendants having from time to time altered their race-ways, water-wheels, and the flow of water, under a claim of right, the plaintiffs should have been granted the relief which they claimed.

5. That evidence was improperly admitted and rejected.

Apart from the last ground of appeal, the real question involved is, whether the plaintiffs are entitled, as against the defendants, to the exclusive use of the waters of the Lake of the Woods.

This is for an absolute exclusion, as, according to the evidence of Mr. Backus of Minneapolis, he is the sole owner of all the shares in the plaintiff company, and owns not only the western outlet of the lake, but also the eastern outlet—the only natural outlets now existing. It follows that, should he succeed in these appeals, the vast area of the Lake of the Woods—over 1,500 square miles in extent, it is said—would be the personal mill-pond of Mr. Backus. The defendants have several millions of dollars invested in the mill and elevators, which the plaintiffs by these actions seek to deprive of the power which they have long been using.

I mention these circumstances merely to indicate the magnitude of the issues involved in this litigation. Of course the gravity of the result does not affect the plaintiffs' rights in any way.

By the cross-appeals the defendants simply claim that the actions should have been dismissed with costs, and that the plaintiffs are not entitled to the reference directed.

The facts are fully stated in the reasons for judgment of Mr. Justice Grant, yet I think something may not unsuitably be said by way of addition or qualification.

In arriving at a proper determination of the issues between the parties, it appears to me of importance carefully to consider the topography of the north shore of the Lake of the Woods in the vicinity of the several properties involved.

With the eastern branch of the Winnipeg river we need have no concern. According to Mr. Backus, it was purchased by him in 1920 or 1921. The previous history of that branch of the river appears in the judgment of Mr. Justice Anglin (now the Chief Justice of Canada) in *Keewatin Power Co. v. Town of*

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About two miles west of the inlet of the western branch of the river, there lies a projection of the lake called Portage Bay. Near-by, the river, after discharging northerly through both its branches, turns to the west, and at a much lower level than the lake passes close to Portage Bay, from which it is separated in several places by a low, undulating, narrow reef or neck of rock, bare or covered only with scattered trees of little or no value. The proximity of the lake to the river, the great difference in the two levels, a ravine and one or more depressions across the reef, and the consequent ease of cutting through the rock along the ravine and depressions, constitute it an ideally attractive location for the development of water-power.

This is so obvious from a glance at the maps filed, notably the McLatchie map of the 14th May, 1881, especially when the conformation of the reef, the difference in the levels on its two sides, and the vast area of the lake as a source of supply, are borne in mind, that no oral testimony was needed to demonstrate it. The first impression, in my opinion, that the locality would make on the mind of any practical business man would be its economic adaptability for the generation of enormous power in more than one place.

Mr. Tilley protested strongly against the admission of evidence from which it might be inferred that locations between Portage Bay and the Winnipeg river were applied for and granted as power-sites. For my part I think that no such evidence was needed to establish the fact. The very topography of the place seems to me conclusive that the Crown-grants of the sites which the defendants occupied in 1916, and still occupy, were made with the common intention on the part of the Crown and the grantees that the subject-matter of the grants should be used for the development of power. Apart from their availability for that purpose, the sites on which the defendants' mills now stand had no more value than any equally narrow reef of barren rock anywhere in the vicinity; yet upon it, as early as 1878, if not earlier, when the territory was in dispute between the Dominion and the Ontario Governments, men of capital desired to acquire power-sites. In that year W. J. Macaulay, of Winnipeg, a licensee of a timber area on the Lake of the Woods, applied to Sir John A. Macdonald for a mill-site on Portage Bay, and in 1880 he was granted a lease for 21 years. In 1881 he assigned his timber licence and the remainder of his term under the lease to Dick & Benning, of Winnipeg.

In April, 1884, a grant in fee of a certain area was made to Macaulay by the Dominion, but, as the description was found to be inaccurate, a new patent was issued to him on the 19th May, 1884. It describes the area granted by metes and bounds and by reference to an attached tracing, stated to have been taken from a plan of survey made by John McLatchie, D.L.S., dated the 14th May, 1881, of record in the Department of the Interior. The tracing, a copy of which is in evidence, shews the granted area of 27 acres to be bisected by a canal leading from the lake to the river, and bears the legend, "W. J. McAuley's Mill-Site," indicating that it was contemplated at the time that the property should be put to the only use for which it was adapted. However, the canal or mill-race does not appear to have been actually cut until later.

The attention of John Mather, a lumber-merchant and capitalist of Ottawa, was attracted by the locality in 1878 or 1879. While the historic Boundary Dispute was determined in the former year, the lands within the disputed area continued to be claimed by the Dominion. In *Regina v. St. Catharines Milling and Lumber Co.*, the question of ownership was first decided in favour of Ontario by the remarkable judgment of Chancellor Boyd (1885), 10 O.R. 196, which persisted unimpaired in the gauntlet of litigation through which it was forced to run: (1886), 13 A.R. 148; *St. Catharines Milling and Lumber Co. v. The Queen* (1887), 13 Can. S.C.R. 577, and (1888), 14 App. Cas. 46.

In the ten-year interval the working arrangement between the conflicting claimants mentioned by Mr. Justice Grant was in operation.

On the 14th August, 1879, a licence to cut timber on an area on the Lake of the Woods, granted by the Dominion to John Dennis and others, was purchased by the Keewatin Lumbering and Manufacturing Company, of which Mather was vice-president and general manager. The reef, as an obviously desirable site for a mill to cut the timber from the limit, naturally appealed to him. The location upon it of the main line of the Canadian Pacific Railway created exceptional facilities for shipment, while its narrowness and its slight elevation above the lake greatly facilitated the development of power. In 1880 Mather had a survey and plan of it made by O. R. Davidson, a Dominion Land Surveyor. Davidson reported to the Hon. T. B. Pardee, Commissioner of Crown Lands for Ontario, on the 5th May, 1880, stating that the mills of the company only awaited the opening of the lake to begin operations, and that they were to be run by the water

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The survey by McLatchie was also made at Mather's instance. It was by Mather's "favour" that the formal instructions of the Surveyor-General of Canada were delivered to McLatchie. Mather himself, possibly on his own motion, but also on the instructions and "additional instructions" of the Deputy Minister of the Interior, reported on the 28th April, 1881, to that gentleman on the water-power at the outlets of the lake, excluding the eastern outlet. In his covering letter Mather said:—

"I have now the honour to send you my report and plan shewing how the water-power at the outlets of the Lake of the Woods may be utilised to the fullest extent. . . The plans made from Mr. McLatchie's late survey will shew the positions of the dam and canals proposed by me as a portion of the scheme, and I took the liberty to request him to note that very particularly."

The report is too long to quote except in part. Three localities are stated to be suitable for the development of water-power. One was on the western outlet of the river, where the plaintiff company, then managed by Mather, afterwards built what is known as "the Roller dam;" the second was where a canal was shewn on a plan sent to Colonel Dennis, "through a natural depression very little above the surface of the lake." The canal "should be 40 feet wide and at least 8 feet deep below the present level of the water in the lake." On this site were subsequently erected the works of the defendant the Lake of the Woods Milling Company. The third was "another canal near McAulay's saw-mill." This "should be 25 feet wide and carry at least 8 feet of water from the lake in order to provide a plentiful supply for a range of mills along Winnipeg Bay." On this site now stand the mills of the defendant the Keewatin Flour Mills Ltd.

It may be observed incidentally—though the fact may be of slight if of any moment—that the ravine mentioned by Mather as "a depression but little above the surface of the lake" appears to have been at times below it—probably only when the water was high. In Dick and Banning's letter of the 30th May, 1887, referring to a prior letter written to the Commissioner in 1885 applying for an area west of their 27 acres, they speak of the place as "*a natural water-way* which with very little improvement could be made a valuable mill-race." Again, in the Kirkpatrick report, the ravine is stated to be "*a natural watercourse*, extending from Portage Bay to the Winnipeg river, proposed to be utilised by the milling company for their water-power."



The order in council (Dominion) of the 5th April, 1887, authorising \$7,000 to be placed in the estimates and paid to Mather for the construction of the Roller dam, recites that with an increased body of water and a permanent water-level, such as the proposed dam would ensure, the narrow neck of land dividing the Lake of the Woods from Winnipeg River "would be made invaluable to capitalists and manufacturers and relieve the companies who have already established themselves, and are now, owing to the lowness of the water, compelled to run their mills on half time only."

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While improvement in the navigation of the lake was one of the objects for which the construction of the dam was sought, another, and to Mather's companies the more important, was stated to be "to maintain a constant head of water for the mills, both saw and grist, which have been and may hereafter be erected, and depend for their power, and therefore their constant working, upon an ample supply of water."

The only capitalists and manufacturers who had established themselves and their mills on the neck between the lake and the river were Mather and his associates; and the mills which had been or might afterwards be erected are now the property of one or other of the defendant companies.

As stated in the opinion of the learned trial Judge, 61 O.L.R. at pp. 366 and 367, the two mill-races on the reef are shewn on the Stewart plan, incorporated in the Ontario patent to Dick and Banning of the 5th January, 1891, and are referred to in the Dominion patent to the Canadian Pacific Railway Company of the 29th March, 1894. In the former grant the mill-race of the Lake of the Woods Company is expressly mentioned.

It is not, I think, open to doubt that the fullest disclosure was made to the Government of Ontario of the particular purpose—absolutely necessary to the success of their undertakings—for which Mather and his associates sought, and ultimately obtained, title to the two power-locations between Portage Bay and the river, or that the provincial authorities sanctioned and encouraged the enterprises, actual or contemplated, that would depend for their success on the development and use of the water-power available obviously across the reef, owing to the physical characteristics there existing.

The approval of the Dominion could not be more clearly manifested than by its contribution of \$7,000 towards ensuring a continuous supply of water for the mill-races constructed by the defendants and in use at the time the appropriation was pro-

App. Div. vided. The desired end was attained by the construction of the Roller dam.

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Lower down the west branch of the river the Keewatin Power Company, under Mather's supervision, built, about 1893, what is called "the Norman dam," but developed no power and erected no buildings during his lifetime. He died in 1906 or 1907, leaving three sons and one daughter. The shares in the plaintiff company which passed to his children, or were otherwise owned by them, were pledged to the Bank of Ottawa as security for advances made to the power company.

In 1911 the Norman dam was leaking, and the Lake of the Woods Milling Company paid the plaintiffs one-third of the cost of repairing it. The milling company had been authorised by 6 Edw. VII. ch. 120 (Dom.) to guarantee an issue of bonds by the Keewatin Flour Mills Company amounting to \$750,000, but its only interest in the reparations was that they were likely to improve the flow through the two canals at Portage Bay.

At a date not definitely fixed but probably in 1911 or 1912, David L. Mather, one of John Mather's sons, interviewed Mr. Backus at Fort Frances with a view to the sale of the Keewatin Power Company's holdings. Nothing was then arranged, but in 1913 Backus agreed to purchase the property. The contract was not produced at the trial, and the little that transpired regarding it is to be found only in the evidence of Backus himself. What is certain is that he did not fulfill his obligation to pay the price which he admits was stipulated. After stating on cross-examination that he had agreed to pay \$425,000, and had made an initial payment of \$70,000, he was asked by Mr. McCarthy:—

"Then am I right in saying you refused to pay the balance? A. Well, this question of diversion came up some time after the initial payment was made."

No better success attended the repetition of the question than, "Well, I think we made more than one payment."

If more than one payment was made, its amount is not stated. That Backus defaulted cannot be doubted, but the precise date of the default is uncertain. That it was after February, 1916, may be inferred from the extract from the minutes of the company of that date, read by Mr. Tilley at the trial, setting forth that the secretary "had received certain letters in connection with the contract for the sale of the company to Mr. Backus. One of such letters was from Mr. Backus himself." It stated "that there was a possibility that the Lake of the Woods Milling Company might obtain an easement to divert water through one of their

artificial channels if quick action was not taken, and that he (the secretary) had accordingly issued a writ against that company for an injunction and a declaration that the company had no right to divert any water. The writ was issued by the company's solicitors in February, 1916. Its purpose, Mr. Backus states, "was to have our title cleared up." That title arose only under the agreement.

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This writ was followed on the 29th March, 1916, by that against the Keewatin Flour Mills Ltd., and **statements** of claim in both actions were filed on the 26th June, in the same year, by the same solicitors, but no further proceeding was taken for many years. In the meantime, early in 1920, Backus acquired from the Bank of Ottawa all the shares of the Keewatin Power Company. This was done, it would appear, at the instance or with the concurrence of the shareholders. The purchaser was at the time as fully aware of the user by the defendants of their power-developments as he was when, in 1916, he desired to have his title under the agreement of 1913 "cleared up." The sale and purchase constituted in effect an abandonment by both parties of the agreement, and involved the right to revive the dormant law-suits, as they were revived in 1927.

Both actions are based on the patent from the Crown to the plaintiffs of the 13th April, 1894. The titles of the defendants, as pointed out in the opinion of Mr. Justice Grant, are based upon grants from the Crown which are prior in date in both instances.

The patent of 1894 refers to an agreement, dated the 24th November, 1891, made between her Majesty, represented by the Commissioner of Crown Lands for Ontario, and the Keewatin Lumbering and Manufacturing Company, a John Mather organisation, of which he was at the time acting secretary. The company on the 22nd September, 1893, assigned to the plaintiffs all its rights and privileges arising under the agreement, which provided that, in consideration of a money payment and the fulfilment of specified obligations, one of which was the expenditure of \$250,000 in developing water-power, the Crown would convey certain lands to the Keewatin Lumbering and Manufacturing Company. The lands included Tunnel Island, on the western branch of the Winnipeg river. The development was the construction of the Norman dam.

The benefit passing to the plaintiffs by the assignment was a right to acquire from the Crown certain described lands.

It is argued by Mr. Tilley that the rights of the plaintiffs against the Lake of the Woods Milling Company, whose patent



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was subsequent to the agreement, can be founded on the agreement as well as on the patent.

I do not think this contention tenable. By the agreement the Crown imposed upon itself an obligation, under stated conditions, to make a grant of certain lands to the Keewatin Lumbering and Manufacturing Company, and such obligation might be enforceable against the Crown by the plaintiffs under the assignment if the original conditions were complied with. But the claim of the plaintiffs to prevent the defendants from using their water-powers must, in my opinion, rest on the patent of 1894. The recitals in it referring to the agreement of 1891 grant nothing to the plaintiffs. Such rights against the defendants as the plaintiffs may have must arise from what appears on the face of the patent itself, regard being had at the same time to the prior grants.

In my opinion, the patent to the plaintiffs was never intended to convey and does not in fact convey the exclusive use to which they assert a right. The lands at Portage Bay were granted by the Crown with full knowledge that they were to be used, and as they were when patented used, as power-sites. It was for their manifest adaptability to such purposes alone that the Mather interests acquired them and the site at Tunnel Island now owned by the plaintiffs. It is simply inconceivable that the same interests should, by acquiring the property now owned by the plaintiffs, desire the impairment of their investment in the defendant companies by eliminating or limiting the water-power serving the great mills of their allied enterprises.

It is not, in my opinion, necessary to refer to any extraneous circumstances or to any evidence to explain or affect the terms of the grant to the plaintiffs. To my mind, by mentioning, in addition to Tunnel Island and a described block of land, "the water-power adjoining thereto on the west branch or outlet of the Winnipeg river," the patent manifests an intention of granting that water-power and none other. Whether the Crown had or had not the right to grant the water-power need not be discussed. I cite the words simply as a manifestation of the intention of the Crown.

What was intended is otherwise shewn by the limitations expressed in the patent. The patent states that the grant is "subject to the condition and understanding that nothing herein contained shall be construed as conferring upon the grantees exclusive rights elsewhere upon the said Lake of the Woods or upon other streams flowing into or out of said lake, or shall confer upon said company power or authority to interfere with or restrict any powers or privileges heretofore enjoyed by us or which may hereafter be



granted or demised to any other person or company in respect of any other water-power on the said Lake of the Woods or any other stream flowing out of or into the said lake."

The "understanding" must have been arrived at by minds representing the grantee as well as the Province of Ontario. Many of the shares in the plaintiff company were then owned by John Mather, and it is in the highest degree improbable that he and his associates should be parties to an understanding that would imperil their other long-established enterprises at Portage Bay.

It, therefore, seems to have been clearly understood, as the patent declares in effect, that nothing contained in it should be taken to mean that any rights conferred by it should enable the grantee to exclude the defendants from the exercise of their rights "elsewhere upon the lake," that is, where to the knowledge of the grantors the defendants had long been using its waters.

As has been stated, no streams were flowing out of the lake originally except the eastern and western branches of the Winnipeg river, and, occasionally, the ravine at Portage Bay, where the plant of the Lake of the Woods Milling Company was located. The only natural stream flowing out of the lake, other than the western branch of the river, was the eastern branch. The use of the plural "streams," while inapt in a sense, can only be given effect to by regarding it as understood to relate to the canals used at the time by the defendants as well as to the eastern outlet of the lake. *Majus valeat quam pareat* should apply to the word.

It was also part of the understanding that the grantee should not have "power or authority to interfere with or restrict any powers or privileges previously enjoyed by the Crown." Among such powers was the undoubted power to grant the lands at Portage Bay, obviously, as I have stated, in order that they should be used as power-sites.

In my opinion, the patent, when properly regarded, required no extraneous evidence to interpret it, and I make no comment on the numerous cases cited by the learned trial Judge and upon the argument of the appeals as to the admissibility of such evidence.

The result arrived at in the Court below seems to be right, and I think the appeals should be dismissed.

Upon the evidence adduced at the trial Mr. Justice Grant did not deem it proper to determine that injury had resulted to the plaintiffs by any changes that had been made in the mill-races: but, while it was realised that the onus of proving damage was

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upon the plaintiffs, they were given an option to take a reference at their own risk as to costs. That option they have exercised.

With the greatest respect, I am humbly of opinion that the option should not have been given. In the first place, the onus was upon the plaintiffs of establishing that they had sustained damages by acts of the defendants in enlarging the canals. I have carefully read all the evidence on the point. It seems to me to amount to no more than that the Keewatin Flour Mills Ltd. cleared out their mill-race by removing rocks that had fallen into it, and that the Lake of the Woods Milling Company rounded off an acute angle of their intake which had created an eddy, and had by so doing increased the head of water at the mills. The supply of water previously was sufficient to permit of the installation of a fire-pump and a plant to generate electric light for the mills. It also enabled the defendants to substitute additional and larger turbines of improved design for the wheels originally installed. That the resulting increased capacity of the mills was due to abstracting from the lake more than was taken when the plants were first operated—even if that gave the plaintiffs a right of action—was not proved.

More solid grounds were in my opinion necessary to be established before a reference was directed.

An additional reason is that a reference would protract litigation which has already continued nearly 15 years. *Interest rei-publicæ ut sit finis litium* is a fundamental legal principle.

I would therefore allow with costs the cross-appeals.

RIDDELL and ORDE, J.J.A., agreed with the Chief Justice.

MIDDLETON, J.A., agreed in the result.

*Appeals dismissed and cross-appeals allowed.*

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[APPELLATE DIVISION.]

1929.

BARKLEY v. BUSH.

April 5.

*Agency—Sale of Land—Commission of Real Estate Agent—Construction of Agency Contract—Statute of Frauds, R.S.O. 1927, ch. 131, sec. 11—Sale Made "through any Person"—Sale Made by Landowner himself.*

The defendant, owning a farm, authorised the plaintiff, a real estate agent, to sell it for \$8,000. In the event of a sale being made, the plaintiff was to be entitled to a commission of \$200. The agency

agreement, which was in the form of a mandate in writing, addressed to the plaintiff, "real estate agent," and signed by the defendant, contained this clause: "Your agency to hold until one month after being notified in writing by me that it shall cease, but for not less than a year from date. If a sale is made through any person during your acting as such agent, you are to be paid the aforesaid commission." Two years elapsed, but no purchaser was found. Without giving any notice to terminate the agreement, the defendant then sold the farm, without the intervention of any other agent or person, for \$7,500:—

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*Held*, by the majority of the Court, that, as the sale was not made "through any person," the plaintiff was not entitled to a commission.

*Howard v. George* (1913), 49 Can. S.C.R. 75, distinguished.

*Weaver v. Dixon* (1928), 62 O.L.R. 419, and *Brinson v. Davies* (1911), 105 L.T.R. 134, followed.

*Per* RIDDELL, J.A., dissenting:—The owner was, in the circumstances, a "person" within the meaning of the contract.

AN appeal by the plaintiff from the judgment of the Fourth Division Court of the United Counties of Stormont Dundas and Glengarry.

The defendant, owning a farm and being anxious to sell it at a satisfactory price, entered into an agreement with the plaintiff, a real estate agent, dated the 17th June, 1925, authorising him to sell the farm for the price of \$8,000. In the event of the sale being made, the plaintiff was to be entitled to a commission of \$200. The clause of the contract now of importance, read as follows:—

"Your agency to hold until one month after being notified in writing by me that it shall cease, but for not less than a year from date. If a sale is made through any person during your acting as such agent, you are to be paid the aforesaid commission."

Two years elapsed, but no purchaser was found. Without giving any notice to terminate the agreement, the defendant then sold the farm for \$7,500. The plaintiff claimed to be entitled to the commission, and brought this action in a Division Court. At the trial he failed, and now appealed.

March 20. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, and MASTEN, JJ.A.

G. A. Stiles, K.C., for the appellant, argued that he was entitled to his commission because the sale was made "through" a "person" other than himself during the currency of the agency contract; that the defendant, though he was the owner, was a "person" within the meaning of that word in the contract. The case of *Weaver v. Dixon* (1928), 62 O.L.R. 419, upon which the learned trial Judge relied, was distinguishable, and the present case should be decided rather on the authority of *Toulmin v. Mil-*

App. Div. *lar* (1887), 58 L.T.R. 96, also reported 12 App. Cas. 746, and  
1929. *Howard v. George* (1913), 49 Can. S.C.R. 75.

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BUSH. *A. D. McKenzie*, for the defendant, respondent, contended that the sale was not made "through any person" whatever, but directly by the defendant to the purchaser. *Weaver v. Dixon* was strictly applicable.

April 5. LATCHFORD, C.J.:—This is an appeal from the judgment of his Honour Judge O'Reilly, in the Fourth Division Court of the United Counties of Stormont Dundas and Glengarry, of the 1st December, 1928, dismissing the plaintiff's claim with costs.

The claim is for "the sum of \$200 commission on sale by Bush of his farm property to one Arthur Gillespie for \$7,500." It is based on a contract made between the parties on the 17th June, 1925, and expressed in a memorandum signed by the defendant and addressed to the plaintiff, "Real Estate Agent."

The defendant disputed the claim in full, alleging that "the farm was not sold through any effort of the defendant." Obviously the last word is intended to be "plaintiff."

Then, as a further defence, sec. 11 of the Statute of Frauds. R.S.O. 1927, ch. 131,\* is pleaded.

The agreement, partly written and partly printed, is on a form used by Barkley, and, so far as material, it empowered him to sell Bush's farm for a minimum price of \$8,000, in which case a commission of \$200 was to be paid. It is silent as to what, if any, commission should be paid if the sale was for less or more than that amount. The agency was to continue for not less than one year, and in addition for one month after the plaintiff was notified in writing by the defendant that it should cease. Then came the following provision: "If a sale is made *through any person* during your acting as such agent, you are to be paid the aforesaid commission."

Barkley did not sell the farm for \$8,000 or at all. Bush, on the other hand, did not notify him that his agency was at an end; but, during its continuance under the agreement, and about two years after the agreement was signed, Bush himself, through negotiation directly with the purchaser, and not through any

\* 11. No action shall be brought to charge any person for the payment of a commission or other remuneration for the sale, purchase, exchange, or leasing of real property unless the agreement upon which such action shall be brought shall be in writing separate from the sale agreement and signed by the party to be charged therewith or some person thereunto by him lawfully authorised.



person, sold the farm for \$7,500. There is no pretence that Barkley brought about the sale.

The agency created by the memorandum was not a general employment. It was a special and limited mandate to sell the farm at a fixed minimum price. Only in that event, apart from the final clause of the memorandum as quoted, was there "an agreement . . . in writing" as required by the statute to pay the plaintiff the commission of \$200 which he claimed.

Mr. Stiles contends that, as Bush had agreed in writing to pay a commission of \$200 if a sale was made through any person, the plaintiff was entitled to recover \$200. I think this contention is absolutely unfounded. It is to be remembered that the words "through any person" are contained in a memorandum addressed to a real estate agent. Bush is agreeing to pay the same commission if he sells through the agency or instrumentality or by means of any person other than Barkley. That to my mind is the natural and obvious meaning of the words. As he sold personally and directly to the purchaser, he did not sell through any person whatever.

*Howard v. George*, 49 Can. S.C.R. 75, was decided on an entirely different state of facts. There the defendant had empowered his agent to sell a property for \$40,000, adding, "I will pay you 5% commission on the purchase-price." Afterwards the agent sold the property, with the concurrence of the owner, for a lesser sum. As the commission was to be based on the purchase-price, the agent was held entitled to it. No other conclusion could be arrived at in the circumstances.

*Weaver v. Dixon*, 62 O.L.R. 419, is more in point. There, as here, the agency was not a general but a special employment—the sale of the farm for a specific sum. As in *Toulmin v. Millar*, 12 App. Cas. 746, it was a limited mandate to sell for a price specified. In this case, if another agent were employed and a sale were made through that agent, apparently at any price, the plaintiff was to be entitled to the same commission as if he had sold the farm for \$8,000; but, as a sale was never made through the instrumentality of any other person, the plaintiff is not entitled to recover.

Accordingly, the appeal should be dismissed with costs.

MIDDLETON, J.A. (after a brief statement of the facts as set out above by way of introduction):—The case of *Brinson v. Davies* (1911), 105 L.T.R. 134, determines that, upon the employment of an agent to sell real estate upon commission, there is, in default of a stipulation to the contrary in the contract, an implied term

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that the owner shall be at liberty to sell the house himself or to employ other agents, and if a sale takes place by such means, the plaintiff is not entitled to commission, although he has found a person prepared to purchase. Here the plaintiff does not suggest that he was able to find any one ready to purchase for \$8,000, the price stipulated for in his agreement, nor does he question the *bona fides* of the sale actually made for \$500 less. His argument is that the defendant, having sold the property and so disabled the plaintiff from ever earning the commission, must now pay for the services that he never has received.

It is sufficient to say that I think that this argument is conclusively met by the case to which I have referred. There would have been an implied term in the contract by which the owner might either sell himself or employ another agent to sell for him. The stipulation which I have quoted modifies this to the extent of giving the plaintiff a right to recover his commission if the property is sold during the currency of the agency through any person, i.e. through another agent, but it does not give to the plaintiff any contractual right if the property is sold by the defendant himself.

I admit that I was somewhat impressed, during the course of the argument, with the idea that the plaintiff had some real grievance, but re-consideration has entirely changed my view. It was apparently impossible to find any one willing to give the price stipulated, and I cannot see that any wrong was done to the plaintiff when the defendant, after this considerable lapse of time, accepted the best offer that he could obtain, although it was \$500 less than that stipulated for in the agency agreement.

The appeal should be dismissed with costs.

MASTEN, J.A.:—I would dismiss this appeal with costs, for the reasons stated by my Lord and by my brother Middleton. I agree with these reasons, and to them I can usefully add nothing.

RIDDELL, J.A.:—The defendant, being the owner of certain lands, entered into a written agreement with the plaintiff—he denies making the contract, but the Judge has found against him, and there is no possible reason to doubt the correctness of the decision. As much of the argument turned upon the wording of the contract, I set it out in full—although to my mind there is little more than one sentence that requires to be considered in arriving at the proper result. It reads thus:—

“To G. N. Barkley,

“Real Estate Agent.

"You are hereby authorised to sell the following property, and to advertise it for sale if you think proper, viz., farm being lots 29 & 30 containing 200 acres in the 6th & 7th concessions in the township of Osnabrock, in the county of Stormont, at and for the price of \$8,000, payable as follows: \$2,000 down at time of purchase, balance on terms to suit purchaser at 5%. A good and sufficient deed will be given free from all dower and encumbrances. Possession March 1st, 1926. Your commission for effecting or for assisting in effecting a sale will be \$200 on full amount of purchase-money. Your agency to hold until one month after being notified in writing by me that it shall cease, but for not less than one year from date. If a sale is made through any person during your acting as such agent, you are to be paid the aforesaid commission.

"Price wanted, minimum \$8,000.

"H. E. Bush."

The contract was not cancelled, but, some two years after the date of the contract, the defendant himself sold the property for \$7,500.

The action is, of course, brought on the clause in the contract: "If a sale is made through any person during your acting as such agent, you are to be paid the aforesaid commission."

The learned trial Judge considers the case covered by the recent case of *Weaver v. Dixon*, 62 O.L.R. 419; but that case has no application whatever in the facts of the present—there it was considered that there was no contract in writing to satisfy the Statute of Frauds; here there is such a contract in express terms.

I do not think it necessary or helpful to consider the general law of agency—the question being one simply of interpreting a plain contract.

It was argued that it was only if a sale should be made through another agent that the commission should be payable; but the word "agent" could not have been left out by inadvertence; it was used in the very sentence, and another word was employed to define those upon the sale through whom the plaintiff should be entitled to receive his commission—not "agent" but "person." It is good law, as it is good logic, that, if a word is employed in a document to describe a certain class, then if another word is employed to describe a class, *primâ facie* this will be another class. To take the case before us, if the parties meant that it was only on a sale by another agent that the plaintiff should become entitled to his commission, they might and *primâ facie* would have used the word they were using as describing the plaintiff's

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position; and, when they used another word than that employed to describe the plaintiff's position, *primâ facie* they were speaking of another class. I can find nothing, in the whole volume of facts, shewing or so much as indicating that the *primâ facie* effect should not be given to the word "person."

It was argued that the word "through" proved that the defendant could not be included in the class meant by the word "person;" but I cannot agree—we are, for example, constantly using the maxim *qui facit per alium, facit per se*, and translating it, "who does anything through another, does it through himself."

Moreover, the circumstances of the case indicate that "person" must here include the owner; care was being taken that the plaintiff as agent was not to lose his labour, if the land when he was trying to sell it should be put out of his power to sell—he would be damaged just as much if the owner sold as if the sale was effected through the agency of another "person." I think the owner was a "person" within the meaning of the contract, that the appeal should be allowed, and judgment entered for the plaintiff for the sum of \$200, with interest from the date of sale and costs here and below.

*Appeal dismissed (RIDDELL, J.A., dissenting).*

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## APPENDIX.

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Ontario cases decided on appeal to the Supreme Court of Canada and reported since the publication of vol. 62 of the Ontario Law Reports.\*

CHANNELL LTD. v. O'CEDAR CORPORATION, 60 O.L.R. 525, in part affirmed and in part reversed by the Supreme Court of Canada: CHANNELL LTD. v. O'CEDAR CORPORATION, [1928] S.C.R. 542.

COURT, RE, 33 O.W.N. 79, affirmed by the Supreme Court of Canada: *In re COURT*, [1929] S.C.R. 50.

ELDER CARRIAGE WORKS LTD. v. SNOW MOTORS INC. AND WETTLAUFER BROS. LTD., 33 O.W.N. 199, reversed by the Supreme Court of Canada: WETTLAUFER BROS. LTD. v. ROBERT ELDER CARRIAGE WORKS LTD., [1928] S.C.R. 580.

GALLAGHER v. MURPHY, 34 O.W.N. 204, reversed by the Supreme Court of Canada: GALLAGHER v. MURPHY AND GILROY, [1929] S.C.R. 288.

HALL v. TORONTO-GUELPH EXPRESS Co., 63 O.L.R. 355, reversed by the Supreme Court of Canada: HALL v. TORONTO-GUELPH EXPRESS Co., [1929] S.C.R. 92, 63 O.L.R. 364.

LANG SHIRT Co.'s TRUSTEE v. LONDON LIFE INSURANCE Co., 62 O.L.R. 83, affirmed by the Supreme Court of Canada: LONDON LIFE INSURANCE Co. v. TRUSTEE OF THE PROPERTY OF THE LANG SHIRT Co. LTD., [1929] S.C.R. 117.

OSBORNE v. LONDON LOAN AND SAVINGS Co. OF CANADA, 29 O.W.N. 185, affirmed by the Supreme Court of Canada: LONDON LOAN AND SAVINGS Co. OF CANADA v. OSBORNE, [1928] S.C.R. 451.

PAPE AVENUE LAND Co. LTD. v. LOUCH, 33 O.W.N. 184, affirmed by the Supreme Court of Canada: LOUCH v. PAPE AVENUE LAND Co. LTD., [1928] S.C.R. 518.

REX v. BAKER, 63 O.L.R. 275, affirmed by the Supreme Court of Canada: REX v. BAKER, [1929] S.C.R. 354, 63 O.L.R. 641.

\* No cases in the Judicial Committee of the Privy Council reported.

REX v. BARTON, 63 O.L.R. 299, affirmed by the Supreme Court of Canada: BARTON v. THE KING, [1929] S.C.R. 42.

ROBERTSON v. ROBINSON, 62 O.L.R. 12, affirmed by the Supreme Court of Canada: ROBERTSON v. ROBINSON, [1929] S.C.R. 175.

SOLICITORS, *Re*, 33 O.W.N. 175, affirmed by the Supreme Court of Canada: NORTHERN LIFE INSURANCE CO. OF CANADA v. MCMASTER, [1928] S.C.R. 512.

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2. *Sale of Land—Commission of Real Estate Agent—Construction of Agency Contract—Statute of Frauds, R.S.O. 1927, ch. 131, sec. 11—Sale Made "through any Person"—Sale Made by Landowner himself.*

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